(1)

Supreme Court, U.S.
FILED
JUL 24 1997
CLERK

No. 96-1400

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX
Volume I, pages 1 to 300

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PETITION FOR CERTIORARI FILED MARCH 4, 1997
CERTIORARI GRANTED JUNE 9, 1997

305 P/2

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* The memorandum and order of the district court denying the State of California's motion to dismiss, the order of the district court issuing a warrant for the arrest of the *Brother Jonathan*, the order of the district court appointing Deep Sea Research, Inc., the exclusive salvor of the *Brother Jonathan*, and the opinion of the court of appeals, are printed in the appendix to the petition for writ of certiorari and have not been reprinted here. Also printed in the appendix to the petition for writ of certiorari and not reprinted here is the text of the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§2101-2106, relevant portions of the Submerged Lands Act, 43 U.S.C. §§1301-1315, relevant portions of California Statutes of 1989, Chapter 732, and the definition of "Abandoned Shipwreck" in Secretary of Interior's Abandoned Shipwreck Guidelines, 55 Fed. Reg. 50120-21 (1990). The memorandum and order of the district court denying the State of California's request for a stay of the district court's decision pending appeal is printed in the respondent's brief in opposition to petition for writ of certiorari and is not reprinted here.

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RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

Proceedings include all events.
3:91cv3899 Deep Sea Research v. Brother Jonathan

REOPEN REFER
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REFER SMASTR

U.S. District Court
U.S. District for the Northern District of California (S.F.)

CIVIL DOCKET FOR CASE #: 91-CV-3899

Deep Sea Research v. Brother Jonathan
Assigned to: Judge Louis C. Bechtle
Referred to: Mag. Judge Bernard Zimmerman

Filed: 11/01/91
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Nature of Suit: 890
Jurisdiction: Federal Question

Cause: 28:1333 Admiralty

11/1/91	1	COMPLAINT (Summons(es) issued) Fee status pd entered on 11/1/91 in the amount of $120.00 (Receipt No. 89732) (mp) [Entry date 11/04/91]
11/1/91	1	ORDER by Judge Charles A. Legge setting status conference for 11:00am on 1/31/92 (cc: all counsel) (mp) [Entry date 11/04/91]

11/4/91	3	Civil Cover Sheet filed (mp) [Entry date 11/05/91]
11/7/91	4	PROOF OF SERVICE by mail by plaintiff of summons, complaint and related documents (mp) [Entry date 11/08/91]
12/9/91	5	ORDER by Judge Thelton E. Henderson Case reassigned to Judge Barbara A. Caulfield (Date Entered: 12/9/91) (cc: all counsel) (mp)
1/2/92	6	MOTION by State of California State Lands Commission to intervene with notice set for 1/31/92 at 9:30 (ml) [Entry date 01/06/92]
1/2/92	7	MEMORANDUM by State of California in support of motion to intervene [6-1] (ml) [Entry date 01/06/92]
1/2/92	8	AFFIDAVIT of Roy H. Minnick regarding motion to intervene [6-1] (ml) [Entry date 01/06/92]
1/2/92	9	AFFIDAVIT of John W. Foster regarding motion to intervene [6-1] (ml) [Entry date 01/06/92]
1/2/92	10	AFFIDAVIT of Goodyear K. Walker regarding motion to intervene [6-1] (ml) [Entry date 01/06/92]
1/2/92	–	RECEIVED Order (State of California) re: [6-1] (ml) [Entry date 01/06/92]
1/3/92	11	CLERK'S NOTICE continuing hearing on State of California's motion to intervene [6-1] 10:00 2/14/92 (ml) [Entry date 01/06/92]

1/7/92	12	CLERK'S NOTICE; Status conference continued to 10:00 2/14/92 (ml) [Entry date 01/08/92]
1/7/92	13	ORDER by Judge Barbara A. Caulfield setting status conference for 10:00 2/14/92 (cc: all counsel) (ml) [Entry date 01/08/92]
1/30/92	–	RECEIVED stipulation and order submitted by plaintiff Deep Sea Research (ml) [Entry date 02/03/92]
2/3/92	14	STIPULATION and ORDER by Judge Barbara A. Caulfield: setting hearing on motion to intervene [6-1] 10:00 3/13/92; Status conference set for 10:00 3/13/92 (cc: all counsel) (ml) [Entry date 02/05/92]
2/28/92	15	OPPOSITION by plaintiff Deep Sea Research to motion to intervene [6-1] (ml) [Entry date 03/04/92]
3/6/92	16	REPLY by California State Lands Commission to response to motion to intervene [6-1] (ml) [Entry date 03/09/92]
3/6/92	17	REPLY to response to motion to intervene [6-1] by California State Lands Commission (ml) [Entry date 03/11/92]
3/13/92	18	MINUTES: (C/R Carl Pline) granting motion to intervene [6-1]; Status conference set for 10:00 6/12/92; Status conference held (ml) [Entry date 03/16/92]

3/20/92	19	ORDER by Judge Barbara A. Caulfield granting motion to intervene to State of California Lands Commission [6-1] (Date Entered: 3/24/92) (cc: all counsel) (ml) [Entry date 03/24/92
4/13/92	20	STIPULATION and ORDER by Judge Barbara A. Caulfield:; Motion filing ddl (dismiss) 6/1/92, and allowing intervention of USA only to respond to opposition to motion to dismiss (cc: all counsel) (ml) [Entry date 04/16/92]
4/22/92	21	PROOF OF SERVICE by plaintiff Deep Sea Research of stipulated scheduling order (ml) [Entry date 04/23/92]
6/16/92	22	REPORTER'S TRANSCRIPT; Date of proceedings: 3/13/92 (C/R: Carl Pline) minutes [18-2] (ml) [Entry date 06/18/92]
6/19/92	23	STIPULATION and ORDER by Judge Barbara A. Caulfield: dismissing case voluntarily without prejudice; appeal filing ddl 8/24/92 (cc: all counsel) (ml) [Entry date 06/23/92] [Edit date 06/23/92]
7/21/92	24	PROOF OF SERVICE by plaintiff Deep Sea Research of dismissal order (ml) [Entry date 07/24/92]
2/4/92	25	STIPULATION and ORDER by Judge Barbara A. Caulfield: reopening the case, Status conference set for 2:30 2/22/94; (cc: all counsel) [3:91-cv-03899] (ml) [Entry date 02/09/94]

2/8/94	26	PROOF OF SERVICE by plaintiff Deep Sea Research of stipulated reopen order [3:91-cv-03899] (ml) [Entry date 02/11/94]
2/18/94	27	JOINT STATUS CONFERENCE STATEMENT by intervenor, defendant, plaintiff, intervenor [3:91-cv-03899] (ml) [Entry date 02/23/94]
2/28/94	28	ORDER by Judge Barbara A. Caulfield Status conference set for 2:30 11/15/94; Briefing schedule in status confernce [sic] statement is adopted (Date Entered: 3/9/94) (cc: all counsel) [3:91-cv-03899] (ml) [Entry date 03/09/94]
4/1/94	29	MOTION before Judge Barbara A. Caulfield by defendant Brother Jonathan for issuance of warrant for the arrest of vessel: Brother Jonathan with Notice set for 9/9/94 at 10:00 [3:91-cv-03899] (ml) [Entry date 04/08/94]
4/1/94	30	RESTRICTED APPEARANCE AND MOTION before Judge Barbara A. Caulfield by intervenor CA State Land Comm to dismiss CA State Lands Commission for lack of jurisdiction with Notice set for 9/9/94 at 10:00 [3:91-cv-03899] (ml) [Entry date 04/08/94]
4/1/94	31	MEMORANDUM by intervenor CA State Land Comm in support of motion to dismiss CA State Lands Commission for lack of jurisdiction [30:1] [3:91-cv-03899] (ml) [Entry date 04/08/94]

4/1/94	32	AFFIDAVIT of Goodyear K. Walker regarding motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] [3:91-cv-03899] (ml) [Entry date 04/08/94]
4/1/94	33	AFFIDAVIT of Roy H. Minnick regarding motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] [3:91-cv-03899] (ml) [Entry date 04/08/94]
4/1/94	34	REQUEST FOR JUDICIAL NOTICE by intervenor CA State Land Comm [3:91-cv-03899] (ml) [Entry date 04/08/94]
4/1/94	35	PROOF OF SERVICE by intervenor CA State Land Comm of dismissal motion papers [3:91-cv-03899] (ml) [Entry date 04/08/94]
4/28/94	36	REPLY by intervenor CA State Land Comm to plaintiff's motion for issuance of warrant for the arrest of vessel: Brother Jonathan [29-1] [3:91-cv-03899] (ml) [Entry date 05/06/94]
4/28/94	37	PROOF OF SERVICE by intervenor CA State Land Comm of reply [3:91-cv-03899] (ml) [Entry date 05/06/94]
5/4/94	38	MEMORANDUM by plaintiff in opposition to motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] [3:91-cv-03899] (ml) [Entry date 05/09/94]

6/1/94	39	MEMORANDUM by intervenor USA in support of constitutionality of the Abandoned Shipwreck Act of 1987 [3:91-cv-03899] (ml) [Entry date 06/09/94]
6/1/94	40	RESPONSE by intervenor CA State Land Comm to motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] [3:91-cv-03899] (ml) [Entry date 06/09/94]
6/1/94	41	AFFIDAVIT of Bryant N. Sturgess regarding motion response [40-1] [3:91-cv-03899] (ml) [Entry date 06/09/94]
6/2/94	42	REPLY by plaintiff to response to motion for issuance of warrant for the arrst of vessel: Brother Jonathan [29-1] [3:91-cv-03899] (ml) [Entry date 06/09/94]
7/12/94	43	MEMORANDUM by Plaintiff Deep Sea Research in opposition to motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] [3:91-cv-03899] (ml) [Entry date 07/20/94]
7/12/94	44	PROOF OF SERVICE by Plaintiff of opposition [3:91-cv-03899] (ml) [Entry date 07/20/94]
7/19/94	45	DECLARATION by David Flohr on behalf of Plaintiff re opposition memorandum [43-1] [3:91-cv-03899] (ml) [Entry date 07/26/94]

7/19/94 46 DECLARATION by Willard Bascom on behalf of Plaintiff re opposition memorandum [43-1] [3:91-cv-03899] (ml) [Entry date 07/26/94]

7/19/94 47 PROOF OF SERVICE by Plaintiff of declarations in opposition [3:91-cv-03899] (ml) [Entry date 07/26/94]

9/1/94 48 CLERK'S NOTICE vacating hearing re motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1], vacating hearing re motion for issuance of warrant for the arrest of vessel: Brother Jonathan [29-1] [3:91-cv-03899] (ml) [Entry date 09/02/94]

9/7/94 49 MOTION before judge Barbara A. Caulfield by Intervenor USA to supplement memo in support of Abandoned Shipwreck Act with Notice set for 9/9/94 [3:91-cv-03899] (ml) [Entry date 09/14/94]

9/8/94 50 AMENDED MOTION before Judge Louis C. Bechtle by Intervenor USA to supplement memo in support of Abandoned Shipwreck Act with Notice set for 9/9/94 at 10:00 [3:91-cv-03899] (ml) [Entry date 09/14/94]

9/9/94 51 MINUTES: (C/R Jim Yeomans) granting motion to supplement memo in support of Abandoned Shipwreck Act [50-1], that the motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] is submitted, that the motion for issuance of warrant for the

arrest of vessel: Brother Jonathan [29-1] is submitted [3:91-cv-03899] (ml) [Entry date 09/14/94]

9/20/94 52 ORDER by Assignment Committee Case reassigned to Judge Louis C. Bechtle (Date Entered: 9/23/94) (cc: all counsel) [3:91-cv-03899] (ml) [Entry date 09/23/94]

9/21/94 55 CLERK'S NOTICE that a continued motion hearing is herby [sic] scheduled before the Honorable Louis C. Bechtle. The motion hearing is currrently [sic] set for Tuesday, September 27, 1994 at 9:00 a.m. [3:91-cv-03899] (cg) [Entry date 09/27/94]

9/23/94 53 MEMORANDUM of points and authorities by Intervenor CA State Land Comm in support of restricted appearance and motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] [3:91-cv-03899] (mcl) [Entry date 09/27/94]

9/23/94 54 FINAL SUPPLEMENTAL BRIEF submitted by Plaintiff Deep Sea Research in opposition to motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] [3:91-cv-03899] (mcl) [Entry date 09/27/94]

9/27/94 56 MINUTES: (C/R Diane Skillman) that the motion to dismiss CA State Lands Commission for lack of jurisdiction [30-1] is submitted. Supplemental

briefs due within ten days. [3:91-cv-03899] (ml) [Entry date 10/03/94]

10/6/94 57 Intervenor, BRIEF on State Remedies FILED by Intervenor CA State Land Comm [3:91-cv-03899] (db) [Entry date 10/11/94]

10/7/94 58 Supplemental BRIEF re availability of the State Forum, FILED by Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 10/11/94]

10/13/94 59 REPLY to plaintif's supplemental brief on remedies by Intervenor CA State Land Comm [3:91-cv-03899] (db) [Entry date 10/19/94]

11/23/94 60 REPORTER'S TRANSCRIPT; Date of proceedings: 9/9/94 (C/R: James Yeomans) [3:91-cv-03899] (tmn) [Entry date 12/01/94]

1/18/95 61 REPORTER'S TRANSCRIPT; Date of proceedings: 9/27/95 (C/R: Diane E. Skillman) [3:91-cv-03899] (db) [Entry date 01/25/95]

3/16/95 62 MEMORANDUM, OPINION, AND ORDER: by Judge Louis C. Bechtle (Date Entered: 3/20/95) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 3/20/95]

3/30/95 63 PROOF OF SERVICE by Plaintiff Deep Sea Research of Graphic's Coordinance, 3/30/95 [3:91-cv-03899] (db) [Entry date 04/03/95]

3/30/95 64 NOTICE of proposed Geographic Coordinates of Salvage Area by Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 04/03/95]

3/30/95 65 DECLARATION re Geographic Coordinates by Mark Barnum on behalf of Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 04/03/95]

4/5/95 66 ORDER DSR is given priority salvage status and sole and exclusive possession of the Brother Jonathan; see order. by Judge Louis C. Bechtle (Date Entered: 4/5/95) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 04/06/95]

4/13/95 67 NOTICE OF APPEAL by Intervenor CA State Land Comm from Dist. Court decision $105 paid, recp #36308, Docketing statement enclosed, Court Reporter's transcript ordering form sent with copy of docket sheet . . . [3:91-cv-03899] (db) [Entry date 04/17/95]

4/13/95 – Docket fee notification form and case information sheet to USCA [67-1] [3:91-cv-03899] (db) [Entry date 04/17/95]

4/17/95 68 NOTICE of entry of order, re 4/5/95 by Plaintiff Deep Sea Research [3:91-cv-03899] (db)

4/18/95 69 ORDER Plaintiffs motion for a preliminary injunction appointing DSR salvor fo [sic] the wreck the Brother Jonathan etc granted, see order by Judge Louis C.

Bechtle (Date Entered: 4/19/95) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 04/19/95]

4/20/95 70 REPORTER'S TRANSCRIPT; Date of proceedings: 9/9/95 (C/R: James Yeomans) [3:91-cv-03899] (db) [Entry date 04/25/95]

4/25/95 – NOTIFICATION by Circuit Court of Appellate Docket Number 95 15693 [3:91-cv-03899] (db) [Entry date 04/26/95]

5/3/95 73 CLERK'S NOTICE directing US Marshal to serve warrant for arresst [sic] of vessel [3:91-cv-03899] (db) [Entry date 05/05/95]

5/4/95 71 ORDER by Judge Louis C. Bechtle amending order for issuance of warrant, clerk to deliver the warrant of arrest to US Marshal. (Date Entered: 5/5/95) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 05/05/95]

5/4/95 72 WARRANT for arrest of vessel 5/4/95 by clerk per order of court . . . T.S. [3:91-cv-03899] (db) [Entry date 05/05/95]

5/8/95 74 ORDER by Judge Louis C. Bechtle amending order of court 3/15/95, motion for issuance of arrest of defendant, the wreck of the Brother Jonathan etc see order, the court appoints DSR substitute process serve in place of US Marshal (Date Entered: 5/10/95) (cc: all

counsel) [3:91-cv-03899] (db) [Entry date 05/10/95]

5/11/95 75 PROOF OF SERVICE of Arrest of a vessel, Original Warrant on return, date of service 5/11/95 See attachments . . . [3:91-cv-03899] (db) [Entry date 05/12/95]

5/15/95 76 TRANSCRIPT DESIGNATION and Ordering Form filed by Intervenor CA State Land Comm for dates 9/9/94 & 9/27/94; C/R: James J. Yeomans & Diane E. Skillman; appeal [67-1] [3:91-cv-03899] (db) [Entry date 05/16/95]

5/15/95 77 NOTICE by Intervenor CA State Land Comm of change of address to State Lands Commission, 100 Howe Avenue, Suite 100 South, Sacramento, CA, 95825-8202: 916 574 1850 [3:91-cv-03899] (db) [Entry date 05/17/95]

5/19/95 78 NOTICE of inventory of Items Recovered from Shipwreck of the Brother Jonathan to date, by Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 05/22/95]

6/1/95 79 PROOF OF SERVICE by Plaintiff Deep Sea Research of Warrant for Arrest of vessel 5/27/95 [3:91-cv-03899] (db) [Entry date 06/02/95]

6/2/95 80 NOTICE of publication in the Recorder re claiming title to vessel, executed 6/2/95 [3:91-cv-03899] (db) [Entry date 06/08/95]

6/7/95	81	PROOF OF SERVICE by Plaintiff Deep Sea Research of proof of publication 6/6/95 [3:91-cv-03899] (db) [Entry date 06/08/95]
6/9/95	82	CLAIM by claimant USA [3:91-cv-03899] (db) [Entry date 06/12/95]
6/9/95	83	PROOF OF SERVICE by Intervenor CA State Land Comm of motion for stay, 6/8/95 [3:91-cv-03899] (db) [Entry date 06/12/95]
6/9/95	84	MEMORANDUM by Intervenor CA State Land Comm in support of stay pending appeal [3:91-cv-03899] (db) [Entry date 06/12/95]
6/9/95	85	MOTION before Judge Louis C. Bechtle by Intervenor CA State Land Comm to stay order 3/15/95 pending appeal [3:91-cv-03899] (db) [Entry date 06/12/95]
6/14/95	86	ORDER, Plaintiff to file a response to motion for a stay of court's order dated 3/15/95 as amended on 5/4/95 on or by 6/28/95. State may file a reply to DSR's response, by 7/5/95 if it decides to do so, there will be no extensions to these deadlines, there will be no hearin [sic] on this matter by Judge Louis C. Bechtle (Date Entered: 6/20/95) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 06/20/95]

6/19/95	87	ANSWER by Claimant USA to complaint [1-1] [3:91-cv-03899] (db) [Entry date 06/21/95]
6/28/95	88	MEMORANDUM by Plaintiff Deep Sea Research in opposition to motion to stay order 3/15/95 pending appeal [85-1] [3:91-cv-03899] (db) [Entry date 06/30/95]
6/28/95	89	DECLARATION by Fletcher C. Alford on behalf of Plaintiff Deep Sea Research re motion to stay order 3/15/95 pending appeal [85-1] [3:91-cv-03899] (db) [Entry date 06/30/95]
6/28/95	90	DECLARATION by David L. Flohr on behalf of Plaintiff Deep Sea Research re motion to stay order 3/15/95 pending appeal [85-1] [3:91-cv-03899] (db) [Entry date 06/30/95]
6/28/95	91	DECLARATION by Steve Lawson on behalf of Plaintiff Deep Sea Research re motion to stay order 3/15/95 pending appeal [85-1] [3:91-cv-03899] (db) [Entry date 06/30/95]
6/28/95	92	DECLARATION by Harvey Harrington on behalf of Plaintiff Deep Sea Research re motion to stay order 3/15/95 pending appeal [85-1] [3:91-cv-03899] (db) [Entry date 06/30/95]
6/28/95	93	DECLARATION by James R. Reedy, Jr. on behalf of Plaintiff Deep Sea Research re motion to stay order

3/15/95 pending appeal [85-1] [3:91-cv-03899] (db) [Entry date 06/30/95]

6/28/95 94 PROOF OF SERVICE by Plaintiff Deep Sea Research of opposition re stay 6/28/95 [3:91-cv-03899] (db) [Entry date 06/30/95]

7/5/95 96 LETTER dated 7/3/95 from Peter Pelkofer re plaintiff's reply to response to motion for stay pending appeal. [3:91-cv-03899] (gba) [Entry date 07/18/95]

7/5/95 97 REPLY by Intervenor CA State Land Comm to plaintiff's response to motion to stay pending appeal [3:91-cv-03899] (gba) [Entry date 07/18/95]

7/5/95 98 PROOF OF SERVICE by Intervenor CA State Land Comm of reply [3:91-cv-03899] (gba) [Entry date 07/18/95]

7/13/95 95 MEMORANDUM OPINION, AND ORDER: by Judge Louis C. Bechtle denying motion to stay order 3/15/95 pending appeal [85-1] (Date Entered: 7/17/95) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 07/17/95]

7/17/95 99 MEMORANDUM OPINION, AND ORDER: by Judge Louis C. Bechtle denying motion to stay order 3/15/95 pending appeal [85-1] (Date Entered: 7/20/95) (cc: counsel) [3:91-cv-03899] (db) [Entry date 07/20/95]

7/21/95 100 PROOF OF SERVICE by Plaintiff Deep Sea Research of motion to display artifacts, 7/21/95 [3:91-cv-03899] (db) [Entry date 07/24/95]

7/21/95 101 MEMORANDUM by Plaintiff in support of motion to display artifacts, dates not notice. [3:91-cv-03899] (db) [Entry date 07/24/95]

7/21/95 102 DECLARATION re motion to display artifacts by Peter Pelkofer on behalf of Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 07/24/95]

7/21/95 103 MOTION before Judge Louis C. Bechtle by Plaintiff Deep Sea Research for leave to to [sic] display artifacts with Notice set for date & time not set [3:91-cv-03899] (db) [Entry date 07/24/95]

7/21/95 104 DECLARATION by Harvey Harrington on behalf of Plaintiff Deep Sea Research re motion for leave to to display artifacts [103-1] [3:91-cv-03899] (db) [Entry date 07/24/95]

7/26/95 105 ORDER by Judge Louis C. Bechtle granting motion for leave to to display artifacts [103-1] (Date Entered: 7/25/95) (cc: all counsel) [3:91-cv-03899] (db)

9/13/95 106 NOTICE of updated inventory of items recovered from shipwreck of the Brother Jonathan, by Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 09/14/95]

1/9/96	107	NOTICE of periodic report of salvage activities, by Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 01/16/96] [Edit date 02/21/96]
1/30/96	–	RECORD on Appeal to USCA, cnsl notified. re appeal [67-1] With exhibits. [3:91-cv-03899] (db)
3/21/96	108	ORDER DSR to file in 20 days detailed salvage plan for the Brother Jonathan and ensure all artifacts recovered are inventoried . . . order of 5/4/95 amended. . . . DSR to file detailed inventory of artifacts recovered from Brother Jonathan every 30 days . . . to be updated every 90 days whenever there is a hiatus in salvage operations due to poor weather . . . once salvage operations are renewed, inventory to be updated every 30 days, by Judge Louis C. Bechtle (Date Entered: 3/25/96) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 03/25/96]
3/21/96	109	MINUTES: 3/20/96 (C/R Jim Yeomans) Status conference set for 12:00 3/22/96 by phone, report due one week after phone conference and every 30 days thereafter. Court will issue an order to prohibit the removal of any items from the jurisdiction of this court.; [3:91-cv-03899] (db) [Entry date 03/25/96] [Edit date 12/18/96]
3/21/96	110	MINUTES: (C/R Jim Yeomans) plaintiff's motion for preliminary injunction-

		held. Court found good cause under Rule 65 to extend TRO 10 days . . . All exhibits retained by the clerk and forwarded to CSA except for #PL5-Map, which was returned to defendants of [sic] make copies of. Court to issue an order [3:91-cv-03899] (db) [Entry date 03/25/96]
4/9/96	111	PROTECTIVE ORDER, Plaintiff Deep Sea Research, Inc.'s Status Report and Updated Recovery Plan," dated 4/9/96 be filed under seal until further order . . . by Judge Louis C. Bechtle: (cc: all counsel) [3:91-cv-03899] (db) [Entry date 04/10/96]
6/7/96	113	ORDER by Judge Louis C. Bechtle for proposed notice plan and protocol (Date Entered: 6/7/96) (cc: all counsel) [3:91-cv-03899] (db)
6/7/96	115	ORDER by Judge Louis C. Bechtle denial to mend [sic] injunction & granting in part amendment to injunction. Designation of a "Safty Zone". . . . (Date Entered: 6/10/96) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 06/10/96] [Edit date 12/18/96]
6/7/96	116	ORDER by Judge Louis C. Bechtle adding special masters Robert F. Kane (Date Entered: 6/10/96) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 06/10/96]
6/10/96	–	ORDER by Judge Louis C. Bechtle referring case to Mag. Judge Bernard

Zimmerman, and referring to special master for findings and conclusions (Date Entered: 6/10/96) (cc: all counsel) [3:91-cv-03899] (db)

6/10/96 – NOTICE Judge Bernard Zimmerman, of the US District Court. Special Appointment of Robert F. Kane as Special Masters in this case for Judge Bechtle [3:91-cv-03899] (db)

6/10/96 114 LETTER adding Magistrate Judge Bernard Zimmerman and Special Master's [sic] Robert F. Kane to mailing list by Judge Bechtle dated 6/6/96 [3:91-cv-03899] (db)

6/10/96 117 ORDER approving the Substitute Custodian proposed notice Plan and protocol . . . by Judge Louis C. Bechtle (Date Entered: 6/10/96) (cc: all counsel) [3:91-cv-03899] (db)

6/10/96 118 ORDER of expert witness Plaintiff/Substitute Custodian has 15 days to show cause why court should not appoint Mr. Gary Gentile as an expert witness, by Judge Louis C. Bechtle (Date Entered: 6/10/96) (cc: all counsel) [3:91-cv-03899] (db)

6/12/96 – NOTICE by Intervenor USA of association of attorney Warren A. Schneider, Frank W. Hunger, Michael J. Yamaguchi [3:91-cv-03899] (db)

6/19/96 119 OBJECTIONS by Claimant USA to proposed appointment of Gary Gentile

as expert witness. [3:91-cv-03899] (db) [Entry date 06/20/96]

6/20/96 120 MEMORANDUM by Plaintiff Deep Sea Research. . . . Re Appointment of Expert Witness. [3:91-cv-03899] (db) [Entry date 06/21/96]

6/20/06 121 OBJECTIONS by Claimant USA to Appointment of Special Master [3:91-cv-03899] (db) [Entry date 06/21/96]

6/24/96 122 REPLY to US Objections to appointments of special Master and expert witness by Plaintiff Deep Sea Research [3:91-cv-03899] (db) [Entry date 06/28/96]

6/26/96 123 OBJECTIONS by Intervenor USA, Claimant USA to Plaintiff's suggestions re appointment of expert witness and its proposed confidentiality agreement. [3:91-cv-03899] (db) [Entry date 06/28/96] [Edit date 12/18/96]

6/26/96 124 RESPONSE to Reply of DSR, Inc. to objections of US to Special Master and Expert Witness, by Intervenor USA, Claimant USA [3:91-cv-03899] (db) [Entry date 06/28/96]

7/5/96 125 MOTION before Judge Louis C. Bechtle by Plaintiff Deep Sea Research to extend of Preliminary Injunction Order, with exhibits [3:91-cv-03899] (db) [Entry date 07/08/96]

8/12/96 126 CERTIFIED COPY of USCA Order: affirming the decision of the District

Court [67-1] for 95-15693, Opinion, Bill of costs. [3:91-cv-03899] (db) [Entry date 08/16/96]

8/16/96 127 CLERK'S NOTICE spreading the mandate in 95-15693 appeal [3:91-cv-03899] (db)

8/27/96 128 ORDER denying US objections to appointment of retired Justice Robert F. Kane as Special Master by Judge Louis C. Bechtle (Date Entered: 8/28/96) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 08/28/96]

8/27/96 144 ORDER Clerk's error, document returned to this, correct file. US objections overruled re court order proposing to appoint Mr. Gary Gentile as an Expert Witness . . . See order Judge Louis C. Bechtle (Date Entered: 12/13/96) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 12/13/96]

8/29/96 129 CERTIFIED COPY OF USCA Order: Mandate issued in this matter is recalled as having issued prematurely, clerk US Court of Appeals. 95-15693 [3:91-cv-03899] (db) [Entry date 09/03/96]

9/11/96 130 ORDER by Judge Louis C. Bechtle granting motion to extend of Preliminary Injunction Order [125-1]; preliminary injunction is extended for two yeas and shall expire on 10/5/98. See order for details (Date Entered: 9/24/96) (cc:

all counsel) [3:91-cv-03899] (slh) [Entry date 09/24/96]

9/30/96 131 ORDER DSR in 7 days to submit a proposed order with text identical to that in document it attached as Exhibit E to its letter of 8/29/96 with modifications . . . by Judge Louis C. Bechtle (Date Entered: 10/1/96) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 10/01/96]

10/2/96 133 ORDER by Judge Louis C. Bechtle for protective order Plaintiff/Substitute Custodian Deep Sea Research, Inc.'s motion for leave to move coins may be filed under seal. Said document to remain sealed until further order of the court. (Date Entered: 10/4/96) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 10/04/96]

10/9/96 134 [Revised] DECLARATION by David L. Flohr filed UNDER SEAL [3:91-cv-03899] (scu) [Entry date 10/10/96]

10/16/96 135 ORDER by Judge Louis C. Bechtle for protective order re plaintiff provides to counsel, to be designated by DSR as confidential. . . . (Date Entered: 10/16/96) (cc: all counsel) [3:91-cv-03899] (db)

10/29/96 136 ORDER Plaintiff/Substitute Custodian Deep Sea Research Inc.'s unopposed motion to move coins, granted, by Judge Louis C. Bechtle (Date Entered:

10/30/96 7:05 am Wed.) (cc: all counsel) [3: 91-cv-03899] (db) [Entry Date 10/30/96]

11/5/96 137 ORDER,, that DSR, shall not dispose of vessel or artifacts and not to encumber, pledge, or lease artifacts . . . unless with order of court, by Judge Louis C. Bechtle (Date Entered: 11/5/96) (cc: all counsel) [3:91-cv-03899] (db) [Edit date 12/18/96]

11/5/96 138 STIPULATION and ORDER re arrest of artifacts, etc . . . Marshal shall maintain an inventory list of artifacts in the Marshal's office file . . . by Judge Louis C. Bechtle: (cc: all counsel) [3:91-cv-03899] (db)

12/2/96 139 ORDER Parties to refer to this action as "The Brother Jonathan Recovery and Archaeological Preservation Litigation" or, on second reference, simply as the "Litigation." This order does not formally change the cation [sic] of the case, the court intends the participants will substitute the descriptive title to the case in court documents and other communications whenever setting for the caption. . . . by Judge Louis C. Bechtle (Date Entered: 12/2/96) (cc: all counsel) [3:91-cv-03899] (db)

12/6/96 140 PROTECTIVE ORDER (copy) Plaintiff Deep Sea Research, Inc's "Status Report," dated 11/22/96, be filed by thhe [sic] clerk under seal . . . signed

12/4/96 LCB by Judge Louis C. Bechtle: (cc: all counsel) [3:91-cv-03899] (db)

12/6/96 142 ORDER, this 3rd day of December, 1996, Parties have 15 days to show cause why Richard W. Palmer, Esq, should not be appointed as an expert witness . . . by Judge Louis C. Bechtle (Date Entered: 12/6/96) (cc: all counsel) [3:91-cv-03899] (db)

12/11/96 143 PROTECTIVE ORDER by Judge Louis C. Bechtle: granting documents Platintidd's [sic] Status Report, 11/22/96 [141-1] (cc: all counsel) [3:91-cv-03899] (db)

12/16/96 145 CERTIFIED COPY of USCA Order for 95-15693: affirming the decision of the District Court [67-1] Costs taxed. For Publication USCA Opinion by Judge E.W. Nelson [3:91-cv-03899] (db)

12/16/96 146 CLERK'S NOTICE mandate of USCA for appeal #95-15693 only, mailed to counsel of record [3:91-cv-03899] (db)

12/30/96 147 ORDER Mr. Palmer will undertake the following, in his capacity as an expert witness, he shall survey the topic of insurance coverage relevant to DSR's recovery operations and furnish the court with a report containing . . . a summary of the insurance covering DSR's recovery activities etc . . . by Judge Louis C. Bechtle (Date Entered: 12/30/96 at 3:30 pm) (cc: all counsel) [3:91-cv-03899] (db)

2/27/97 148 OPPOSITION by Intervenor, Claimant, Intervenor to plaintiff's motion for leave to release exemplar coins. [3:91-cv-03899] (db) [Entry date 02/28/97]

2/27/97 149 DECLARATION by Warren A. Schneider on behalf of Intervenor, Claimant [3:91-cv-03899] (db) [Entry date 02/28/97]

3/4/97 150 ORDER by Judge Louis C. Bechtle for protective order re Motion for leave to release exemplar coins, dated 2/12/97 with declarations of David Flohr and Robert Johnson (Date Entered: 3/4/97) (cc: all counsel) [3:91-cv-03899] (db)

3/5/97 151 MOTION before Judge Louis C. Bechtle by Plaintiff Deep Sea Research for leave to to release exemplar coins [3:91-cv-03899] (db) [Entry date 03/07/97]

3/20/97 154 RECORD ON APPEAL RETURNED FROM USCA [67-1] file returned back to the USDC Thursday, 3/20/97 [3:91-cv-03899] (db) [Entry date 03/21/97]

4/1/97 155 PROTECTIVE ORDER kPlaintiff's [sic] reply Intervenor US partial opposition re release exemplar coins, 3/10/97 with declarations of David Flohr, Robert Johnson & Fletcher C. Alford be filed under seal. . . . by Judge Louis C. Bechtle: (cc: all counsel) [3:91-cv-03899] (db)

4/3/97 160 PROTECTIVE ORDER: Order under seal of the court, not open for examination by Judge Louis C. Bechtle: (cc: all counsel) [3:91-cv-03899] (db)

4/3/97 161 PROTECTIVE ORDER by Judge Louis C. Bechtle: (cc: all counsel) [3:91-cv-03899] (db) [Entry date 04/04/97]

4/18/97 163 ORDER re filing under seal, status report by Judge Louis C. Bechtle (Date Entered: 4/22/97) (cc: all counsel) [3:91-cv-03899] (db) [Entry date 04/22/97]

5/12/97 164 ORDER Plaintiff to deposit in cash the amount of $10,000.00 into the Registry of the Clerk of Court USDC for the Eastern District of Pennsylvania. The purposed [sic] for this order is to establish a source for the court appointed expert witnesses to draw as they incur fees and costs. . . . See order by Judge Louis C. Bechtle (Date Entered: 5/12/97) (cc: all counsel) [3:91-cv-03899] (db)

5/20/97 165 SEALED document of Declaration for order re liquidation of coins, by Plaintiff Deep Sea Research (db) [Entry date 05/22/97]

5/20/97 166 SEALED document of Declaration on motion for order re liquidation of coins, by Plaintiff Deep Sea Research (db) [Entry date 05/22/97]

5/20/97 167 SEALED document of motion for order authorizign [sic] liquidation of coins, by Plaintiff Deep Sea Research (db) [Entry date 05/22/97]

5/27/97 168 ORDER by Judge Louis C. Bechtle for protective order Documents filed with the Court by Plaintiff Deep Sea Research or intervenor US, which in any way identify or refer to specific items recovered from the wreck of The Brother Jonathan, describe the location of the wreck, or specify dates of recovery work shall be filed by the Clerk of the Court under seal. (Date Entered: 5/27/97) (cc: all counsel) [3:91-cv-03899] (db)

6/5/97 169 NOTICE of non opposition to motion of DSR for order authorizing liquidation of coins. by Intervenor USA, Claimant USA, Intervenor USA [3:91-cv-03899] (db)

6/11/97 170 ORDER US to file a responsive brief with points and authorities that meet the legal issues raised by DSR within seven (7) days from the date of this order. by Judge Louis C. Bechtle (Date Entered: 6/11/97) (cc: all counsel) [3:91-cv-03899] (db)

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 95-15693 Filed: 4/20/95
Nsuit: 3890 Other Statutory actions (Fed)
Deep Sea Research, et al v. State of California, et al
Appeal from: Northern District of California (San Francisco)

Case type information:
1) civil
2) US
3)

Lower court information:
District: 0971-3 : CV-91-03899-LCB
court reporter: James Yeomans
court reporter: Diane Skillman
presiding judge: Louis Charles Bechtle, Chief District Judge
court reporter: Carl Pline
Date Filed: 11/1/91
Date order/judgment: 3/20/95
Date NOA filed: 4/17/95

Fee status: paid

Prior cases:
None

Current cases:
None

DEEP SEA RESEARCH, INC. Plaintiff - Appellee	Fletcher Alford 415/986-5900 [COR LD NTC ret] GORDON & REES 275 Battery Street Embarcadero Center West San Francisco, CA 94111

v.

THE BROTHER JONATHAN, her Appurtenances, furniture, cargo, etc. Defendant	
STATE LANDS COMMISSION Defendant-intervenor - Appellant	Linus Masouredis, Esq 415/464-1263 [COR LD NTC dag] Joseph Rusconi 510/286-4142 [COR LD NTC dag] OFFICE OF THE ATTORNEY GENERAL 2101 Webster Street 12th Floor Oakland, CA 94612-3049 Peter PelKofer 916/322-2277 [COR LD NTC dag] STATE LANDS COMMISSION 100 Howe Avenue Ste. 100-South Sacramento, CA 95825

UNITED STATES OF AMERICA Defendant-intervenor - Appellee	Barbara B. O'Malley, Attorney [COR LD NTC gov] U. S. DEPARTMENT OF JUSTICE Torts Branch, Civil Division P. O. Box 14271 Washington, DC 20044-4271 202-724-6877
STATE OF CALIFORNIA Defendant-intervenor - Appellant	Linus Masouredis, Esq (See above) [COR LD NTC dag] Joseph Rusconi (See above) [COR LD NTC dag]

DEEP SEA RESEARCH, INC.

Plaintiff - Appellee

v.

THE BROTHER JONATHAN, her Appurtenances, furniture, cargo, etc.

Defendant

and

STATE LANDS COMMISSION;

Defendant-intervenor - Appellant

STATE OF CALIFORNIA

Defendant-intervenor - Appellant

UNITED STATES OF AMERICA

Defendant-Intervenor

4/20/95 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : n. setting schedule as follows: appellant's designation of RT is due 4/27/95; appellee's designation of RT is due 5/8/95; appellant shall order transcript by 5/17/95; court reporter shall file transcript in DC by 6/19/95,, ; certificate of record shall be filed by 6/26/95; appellant's opening brief is due 8/3/95; appellees' brief is due 9/5/95; appellants' reply brief is due 9/18/95; [95-15693] (em)

4/20/95 Filed attorney for Appellant Civil Appeals Docketing Statement served on 4/12/95 (to CONFATT) [95-15693] [95-15693] (em)

4/27/95 Received Appellant notice of designation of reporter's transcript. (RTs of 9/9/94 & 9/27/94 ordered) [95-15693] (dg)

8/1/95 14 day oral extension by phone of time to file Appellant brief. [95-15693] appellants' brief due 8/17/95; appellees' brief due 9/18/95; optional reply brief is due 14 days from service of the answering brief. (mag)

8/16/95 Received Appellee Deep Sea Research letter dated 8/15/95 re: aple Deep Sea Research does not oppose the Columbus America Discovery Group's request to file an amicus brief. (Amicus motion/brief not yet received). CASE FILE [95-15693] (em)

8/16/95 Filed original and 15 copies Appellant State Lands Commiss. opening brief (Informal: n) 35 pages and five excerpts of record in 1 volume ; served on 8/16/95 [95-15693] (em)

8/22/95 Filed original and 15 copies Columbus-America's amicus brief of 31 pages ; served on 8/17/95 (Note: letters of consent on last 2 pages of amicus brief) [95-15693] (em)

9/6/95 14 day oral extension by phone of time to file Appellee Deep Sea Research's brief. [95-15693] appellees' brief due 10/2/95; reply brief is due 14 days . . . (jlc)

9/7/95 14 day oral extension by phone of time to file Appellee USA's brief. [95-15693] appellees' brief due 10/2/95; reply brief is due 14 days . . . (jlc)

9/11/95 Filed Appellant State Lands Commiss.'s motion to enjoin salvage & to expedite appeal, served on 9/8/95 [2861690] (CIVATT by promo) [95-15693] (dg)

9/14/95 Copy of letter received from Fletcher C. Alford, Esq. for Deep Sea Research sent to Barbara B. O'Malley, Esq. for USA re: in response to her letter to him regarding the request for an extension to file their brief. [95-15693] (dg)

9/18/95 Filed Appellee Deep Sea Research response opposing appellant's motion for injunction [2861690-1] served on 9/18/95 (CIVATT) [95-15693] (dg)

9/20/95 Filed Appellee USA response to aplt's motion to enjoin salvage and for expedited hearing on appeal [2861690-1] [2861690-2] served on 9/18/95 (CIVATT) [95-15693] (dg)

10/2/95 Filed original and 15 copies appellee USA's 33 pages brief, ; served on 9/29/95 [95-15693] (dg)

10/3/95 Received orig. 15 copies Deep Sea Research's brief of 42 pages; served on 10/2/95 deficient: oversize (motion to promo) [95-15693] (dg)

10/3/95 Filed Deep Sea Research motion to file oversized brief served on 10/2/95 [2874699] (CIVATT by promo) (dg)

10/16/95 Filed order (Robert R. BEEZER, David R. THOMPSON) : Aplt State of CA's motion for injunction is denied. U.S.'s motion for injunction is denied. Aple's motion for an ext of time to file a response to the State's motion is denied as moot. Aple's motion to file an oversized brief is granted. The clerk shall file aple's brief received on 10/3/95. [287469921] [2861690-1], [2861690-2] Appellants' reply brief due 10/30/95. Aplt State of CA's motion to expedite is granted. The clerk shall place this appeal on the next available calendar after completion of briefing. [95-15693] (dg)

10/16/95 Filed original and 15 copies appellee Deep Sea Research's 42 pages brief, 1 Exc. vols: ; served on 10/2/95 [95-15693] (dg)

10/27/95 Filed original and 15 copies State Lands Commiss., State of California reply brief, (Informal: no) 15 pages; served on 10/26/95 [95-15693] (dg)

11/17/95 Calendar check performed [95-15693] (mw)

11/28/95 Filed motion & order: (Deputy Clerk: cb) The state intervenors' request for judicial notice and any related filings shall be referred to the merits panel for resolution. [2904356-1] Motion recvd 11/22/95 [95-15693] (dg)

12/10/95 Calendar materials being prepared. [95-15693] [95-15693] (aw)

12/13/95 Filed Appellee Deep Sea Research response opposing motion to take judicial notice of . . . [2904356-1] served on 12/13/95 (CALENDAR FOR MERITS PANEL * * *) [95-15693] (dg)

12/16/95 CALENDARED: SAN FRAN Feb 13 1996 9:00 am Courtroom 1 [95-15693] (aw)

1/10/96 Copy of plaintiff's periodic report of salvage activities filed in DC on 1/9/96. (PANEL by fax) [95-15693] (dg)

2/1/96 Filed certified record on appeal in 3 Vols. (total): 3 Clerks Rec & 3 expandos. (ORIGINAL) [95-15693] [95-15693] (dg)

2/6/96 Filed USA additional citations, served on 2/5/96 (PANEL by fax) [95-15693] (dg)

2/13/96 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Dorothy W. NELSON & Alex KOZINSKI; CJJ. [95-15693] (jr)

4/2/96 Filed State of California additional citations, served on 4/1/96 (PANEL by express mail) [95-15693] (dg)

4/4/96 Filed Deep Sea Research additional citations, served on 4/3/96 (PANEL) [95-15693] (dg)

7/17/96 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Mary M. SCHROEDER; Dorothy W. NELSON, author; Alex KOZINSKI.) FILED AND ENTERED JUDGMENT. [95-15693] (dg)

7/29/96 Filed Appellee Deep Sea Research bill of costs, served on 7/29/96 ($488.00) [95-15693] (dg)

8/8/96 MANDATE ISSUED costs taxed against aplt for $204.00 [95-15693] (crw)

8/29/96 Filed order (Deputy Clerk: crw) The mandate issued in this matter is hereby recalled as having issued prematurely. [95-15693] (crw)

8/30/96 [3075812] Filed original and 40 copies Appellant State Lands Commiss., Appellant State of California petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 8/30/96 (PANEL & ALL ACTIVE JUDGES) [95-15693] (dg)

12/4/96 Filed order and amended opinion (Judges Mary M. SCHROEDER, Dorothy W. NELSON, author, Alex KOZINSKI) (Orig. opinion id: [3046108-1]) denying petition for enbanc rehearing [3075812-1] [95-15693] (dg)

12/12/96 MANDATE ISSUED (Costs taxed $204. against state of CA) [95-15693] (ah)

COMPLAINT

STUART M. GORDON, State Bar No. 37477
BRADFORD W. LOMAS, State Bar No. 115043
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Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC.,

Plaintiff,

vs.

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,

Defendants.

/

No. C 91 3899 CAL

VERIFIED COMPLAINT

(Filed Nov. 1, 1991)

1. This is a Complaint in Admiralty for salvage and the salvor's possessory rights and for a confirmation of title in salvage and finds, and for maritime declaratory relief under general Maritime Law.

I

PARTIES

2. Plaintiff DEEP SEA RESEARCH, INC. ("DEEP SEA RESEARCH") is a corporation at all times herein mentioned duly organized, validly existing and in good standing under the laws of the State of California with its principal place of business located in Diamond Bar, California. The President of DEEP SEA RESEARCH is Donald Knight.

3. Defendant in this case is the S.S. BROTHER JONATHAN, her appurtenances, furniture and cargo. Defendant, the S.S. BROTHER JONATHAN ("THE BROTHER JONATHAN"), is a wrecked, sunken and lost or abandoned wooden hulled, double-side-wheeled paddle steamer which was transporting cargo and passengers in the navigable waters of the Pacific Ocean in the United States in 1865.

4. THE BROTHER JONATHAN is a "vessel of the United States" under the laws of the United States within the meaning of Title 46 of the United States Code.

5. On information and belief, on or about July 30, 1865, THE BROTHER JONATHAN, laden with a large and valuable cargo of mining and milling supplies along with gold and silver coin, jewelry, United States currency and gold certificates, sank in the Pacific Ocean approximately four and one-half miles off of the coast of Crescent City, California while proceeding on a voyage from San Francisco to Puget Sound.

II

JURISDICTION AND VENUE

6. This is a case of salvage and finds of lost and abandoned maritime property. It is a civil maritime action within admiralty and maritime jurisdiction and includes several exclusive admiralty and maritime claims within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and the Court has subject matter jurisdiction under 28 U.S.C. 1333. A Federal Court has exclusive jurisdiction of an action seeking a salvage award in admiralty. *Jacob Houseman v. Cargo of Schooner North Carolina* 40 U.S. 40 (1841).

7. As the Court has jurisdiction under 28 U.S.C. 1333, the Court may declare the rights and other legal relations of any interested party seeking that declaration under the Declaratory Judgment Act, 28 U.S.C. 2201 *et. seq.*

8. Under Federal Rules of Civil Procedure 82, an admiralty and Maritime claim within the meaning of Fed. Rules Civ. Proc. 9(h) is not treated as a civil action for purposes of 28 U.S.C. 1391-1393, and venue is proper in the district where the defendant vessel THE BROTHER JONATHAN may be found and subject to the exercise of *in rem* jurisdiction and where the salvor and owner of the defendant vessel THE BROTHER JONATHAN are residents.

III

FACTUAL ALLEGATIONS

9. Plaintiff DEEP SEA RESEARCH is a corporation at all times herein mentioned duly organized, validly existing and in good standing under the laws of the State

of California with its principal place of business located in Diamond Bar, California. At all times referred to herein it has been engaged in the business of maritime research and salvage. Corporations as the owners of vessels may maintain a salvage action. *The Ship Blackwall v. Sausalito Water and Steam Tug Company* 77 U.S. (10 Wall) 1, 19 L.Ed. 970 (1869).

10. The plaintiff is a voluntary salvor acting on its own behalf for itself as to its salvage claim. It is under no official or legal duty to render assistance to THE BROTHER JONATHAN, its appurtenances, furniture or cargo. THE BROTHER JONATHAN is a wrecked, sunken and lost or abandoned wooden hulled, double-side-wheeled paddle steamer which was transporting cargo and passengers in the navigable waters of the Pacific Ocean and the United States in 1865.

11. THE BROTHER JONATHAN is a "vessel of the United States" within the meaning of Title 46 of the United States Code. Because the vessel is a sunken wreck, under U.S. law, reinstatement of vessel status occurs upon recovery.

12. On information and belief, on or about July 30, 1865, THE BROTHER JONATHAN, laden with a large and valuable cargo of gold and silver coin, jewelry, United States currency and gold certificates, sank in the Pacific Ocean approximately four and one-half miles off the coast of Crescent City, California while proceeding on a voyage from San Francisco, California to Puget Sound, Washington.

13. On or about July 16, 1991, plaintiff located the abandoned wreck of THE BROTHER JONATHAN lying at a depth of approximately 220 feet, four and one-half

miles off the coast of Crescent City, California. Examination of the wreck has been conducted pursuant to the general maritime law and all applicable statutes.

14. The plaintiff has voluntarily rendered in the past valuable services utilizing costly equipment with significant skill and expertise while exposed to great risk, while examining the defendant vessel, her appurtenances, furniture and cargo. The services of the plaintiff were rendered in the past in a prompt, efficient and successful manner requiring great skill and, expertise.

15. The plaintiff will voluntarily render in the future, with the approval of this court, valuable salvage services utilizing costly equipment with significant skill and expertise while exposed to great risk, all in the recovery of the defendant vessel, her appurtenances, furniture and cargo. The salvage services of plaintiff will be rendered in the future in a prompt, efficient and successful manner requiring great skill and expertise.

IV

IN REM JURISDICTION INVOKED

16. Plaintiff invokes the exclusive *in rem* jurisdiction of this Court for its salvage claim under Supplemental Rule C of the Fed. Rules Civ. Proc. and seeks the exercise of jurisdiction by the Court *in rem* over the vessel THE BROTHER JONATHAN – a derelict, sunken and lost or abandoned wooden hulled, doublewheeled paddle steamer currently lying at a depth of 220 feet of water, four and one-half miles off the coast of Crescent City, California – its appurtenances, furniture and cargo, *in rem* together compromising the *res derelictae* (the "*res*") of this claim in salvage and finds. The salvage site

lies outside major shipping lanes and poses no hazard to navigation.

17. Plaintiff seeks the exercise of *in rem* jurisdiction by:

a. Admitting the presence of the *res*, encompassing THE BROTHER JONATHAN, its appurtenances, furniture and cargo within the jurisdiction of the Court;

b. Filing and serving its claim of salvage against the vessel;

c. Making a general appearance conferring *in personam* jurisdiction, *See, Booth Steamship v. Tug Dalzell No. 2* (1966) A.M.C. 2615 (S.D. N.Y. 1966); *also, Reed v. Yaka* 307 F.2d. 203, 63 A.M.C. 672, (3d. Cir. 1962);

d. Exercising possession, actual and constructive, and control over the defendant vessel THE BROTHER JONATHAN, her appurtenances, furniture and cargo;

18. Plaintiff will further seek the exercise of *in rem* jurisdiction by:

a. Tendering into the custody of the Court proof of its discovery and claim and for purposes of conferring exclusive *in rem* jurisdiction over the vessel and subjecting the vessel to process and arrest within the district upon a substitute *res* in the form of tangible property salved and recovered from the defendant vessel and a videotape of the wreck into the lawful custody of the Court (*See, Klein v. Unidentified Wrecked and Abandoned Sailing Vessel,* 758 F.2d. 1511 (1985)); and,

b. Tendering into the Court's custody a videotape recording of the *res* at the wreck site and, as further evidence of constructive possession by telepresence and telepossession, by maintaining physical contact with the

vessel *in situ* through the use of a remotely operated vehicle (ROV). (*See, Columbus American Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel* 1990 A.M.C. 2409 (E.D. Va. 1990)

19. The requirement of Supplemental Rule E(3) for *in rem* service within the district will be met by service of process by the United States Marshal upon artifacts brought into the district and deposited into the custody of the Court. *(See, Indian River Recovery Co. v. The China, Her Appurtenances, etc.* 645 F.Supp. 141 (B.C. De. 1986).

FIRST CAUSE OF ACTION AGAINST THE BROTHER JONATHAN, HER APPURTENANCES, FURNITURE AND CARGO IN SALVAGE AND FINDS
(Declaration of Priority Salvage Status)

20. Paragraphs 1 through 19 are incorporated by reference in this First Cause of Action as though fully set forth at length herein.

21. In furtherance of its salvage claim, plaintiff seeks in the form of interlocutory relief under Supplemental Rule C, a declaration of priority salvage status and sole and exclusive possession under the law of salvage, and custodian (*in custodia legis*) of the defendant vessel THE BROTHER JONATHAN, her appurtenances, furniture and cargo for the pendency of the salvage effort anticipated to consume at least five years. Further, plaintiff seeks Court declaration of a safety zone in a circle with a radius of 5200 feet with the wreck as the centerpoint around the salvage site, that zone to be incorporated in a Notice to Mariners and reflected on oceanographic charts of the area.

22. The plaintiff seeks interim custody (*in custodia legis*) of the defendant vessel THE BROTHER JONATHAN, her appurtenances, furniture and cargo and other artifacts recovered from the wreck to be retained in the physical possession of the plaintiff for preservation and restoration purposes pending ultimate disposition subject to Court approval of a salvage award and confirmation of title in the *res*.

23. Since July 16, 1991, the plaintiff has maintained a vessel and crew on the site of the wreck on a repeated, open and notorious basis.

24. Plaintiff is in the process of arranging for appropriate facilities for the photographing, measuring, inventory, restoration and preservation of the artifacts to be recovered from the wreck.

25. The plaintiff's actions clearly demonstrate its actual and constructive possession, and exercise of control over the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo, as well as the requisite capability to reduce the *res* to possession as to give rise to its claim of salvage for which it seeks recognition by the Court and declaration of priority in salvage and also the protection of the Court for the duration of the salvage effort.

26. The law does not require one who discovers abandoned property actually to have it in hand. The law protects those who discover abandoned property and allows them to salvage the property without interference. *Indian River Recovery Company v. The China, Her Appurtenances, Etc.* 645 F.Supp. 141 (1989). "A finder may be protected by taking such constructive possession of the property as its nature and situation permit." *Treasure Salvors v. Unidentified, Wrecked and Abandoned*

Sailing Vessel 640 F.2d 560, 572 (5th Cir. 1981). This plaintiff has clearly done with regard to THE BROTHER JONATHAN, her appurtenances, furniture and cargo.

27. Plaintiff submits that its actions relative to THE BROTHER JONATHAN, her appurtenances, furniture and cargo clearly and effectively indicate its intention, capability, competency and constructive steps to exercise dominion and control over the vessel and more than meet the requirement of constructive possession and control. Plaintiff submits that these actions warrant the Court's approval of the plaintiff's claim of priority in salvage. Accordingly, plaintiff seeks a liberal salvage award for voluntary salvage against THE BROTHER JONATHAN, her appurtenances, furniture and cargo.

28. The elements of a *prima facie* salvage claim are set forth in the U.S. Supreme Court case of *The Sabine*, 101 U.S. 384 (1879). To be recognized as a maritime lien, a claim for salvage award requires that three elements be shown; (a) a maritime peril from which the ship or other property could not have been rescued without the salvor's assistance; (b) a voluntary act by the salvor under no official or legal duty to render assistance; and (c) helping to save at least part of the property at risk. Each of these elements is satisfied with regard to plaintiff's present claim against defendant.

29. With regard to the first element of peril, plaintiff submits that the defendant vessel THE BROTHER JONATHAN, her appurtenances, furniture and cargo are either lost property consistent with the current ownership of the vessel or abandoned property. In the case of an abandoned vessel, marine peril exists as a matter of law

where the ship's location was previously unknown. *Platoro Limited, Inc. v. Unidentified Remains of A Vessel,* 695 F.2d 893, 901 (5th Cir. 1983).

30. Plaintiff submits that the wreck of THE BROTHER JONATHAN, her appurtenances, furniture and cargo is lost or abandoned, as over 100 years have elapsed since the last serious discovery of the wreck and, but for the plaintiff's discovery efforts, the vessel may become lost to the elements or susceptible to looting as the current location of the vessel is now, by virtue of this claim, a matter of public knowledge and record.

31. The second element of a valid salvage claim is a voluntary act by the salvor under no official or legal duty to render assistance. Plaintiff is a volunteer and under no official or legal duty to render assistance to THE BROTHER JONATHAN, her appurtenances, furniture and cargo which constitute the *res* in this case and the basis for the salvage claim.

32. In this case, plaintiff expended its own funds in the background research and discovery efforts, has no agreement to render services to the vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo with any person and has received no compensation as consideration for its efforts. Clearly plaintiff's efforts and claim are those of a volunteer in this instance.

33. The third element of a *prima facie* claim of salvage is success in saving or in helping to save at least part of the property at risk. Plaintiff submits that if its priority status as salvor in this instance is declared, it has the requisite competency and capability to successfully complete the salvage project. Plaintiff presently possesses the requisite skill, expertise and equipment to

effectively conduct successful salvage operations upon THE BROTHER JONATHAN, her appurtenances, furniture and cargo. At the Court's request, plaintiff will submit a specific preliminary salvage plan for the salvage operations which plaintiff seeks to conduct upon the defendant vessel, her appurtenances, furniture and cargo.

34. Accordingly, plaintiff seeks a liberal salvage award for the voluntary salvage against THE BROTHER JONATHAN, its appurtenances, furniture and cargo.

35. Early in the history of American jurisprudence, the Supreme Court prescribed the main factors to be considered in determining the amount of an award to be decreed for a voluntary salvage service. These factors are to include:

a. Labor expended by the salvors in rendering the salvage service;

b. The promptitude, skill and energy displayed in rendering the service and saving the property;

c. The value of the property employed by the salvors in rendering the service, and the peril to which the property was exposed;

d. The risk incurred by the salvors in securing the property from the impending peril;

e. The value of the property salved; and,

f. The degree of danger from which the property was rescued.

The Ship Blackwell v. The Sausalito Water and Steam Tug Company 77 U.S. (10 Wall) 1, 14, 19 L.Ed. 870 (1869).

36. The purpose of a liberal salvage award is to reward perilous salvage services voluntarily rendered and to discourage embezzlement. *Ibid.* Both a vessel and its cargo are separately liable for a salvage award. *Nicholas E. Vernicos Shipping v. U.S.*, 223 F.Supp. 116 (S.D. N.Y. 1963).

37. Compensation for salvage is not viewed by the admiralty courts merely as pay on the principal of *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services voluntarily rendered, and as an inducement to mariners to embark on such dangerous enterprises to save life and property. *The Sabine*, 101 U.S. 384 (1879). The only recognized limitation is that compensation for such services if voluntarily rendered cannot exceed the value of the property salved, and for that the salvors had a maritime lien on the salved property independent of possession, and which continues until the compensation is paid so long as the property remains in specie. *Id.* at 390.

38. In the present case, plaintiff has thus far utilized meticulous attention to detail, use of advanced computer modeling, state of the art robotics and engineering practice and an exceptional degree of care in the discovery of the defendant vessel, its appurtenances, furniture and cargo in its landmark effort to examine a 19th century ocean going vessel intact with a full complement of valuable artifacts. All of these services have thus far been rendered by plaintiff independent of any cost considerations and amidst great peril in swirling seas amongst treacherous shoals. Plaintiff will continue to utilize meticulous attention to detail, use of advanced computer modeling, state of the art robotics and engineering practices and an exceptional degree of care in

the salvage and recovery of the defendant vessel if permitted to do so by this court.

39. Accordingly, the extensive time, expense and resources already committed and anticipated to be committed in the future to the project dictate that the most liberal salvage award possible be made to plaintiff concurrent with the completion of successful recovery operations providing for annual sale or auction of the portion of the artifacts recovered and distribution of the proceeds of sale or auction. Such a liberal salvage award will represent a recognition of the efforts and services of the plaintiff and serve as an incentive for similar efforts by other would-be salvors of our nation's cultural heritage, balancing and serving the interests of free enterprise, archaeological preservation, and environmental protection.

40. In addition to possession and custody (*in custodia legis*) of the vessel THE BROTHER JONATHAN, her appurtenances, furniture and cargo for the duration of the salvage effort until a salvage award is made by the Court under the law of salvage upon the successful salvage of the *res*, plaintiff further seeks confirmation of title under the Admiralty Law of Salvage and the Common Law of Finds with respect to the defendant vessel THE BROTHER JONATHAN, her appurtenances, furniture and cargo as to any residue subject to confirmation of title free and clear against all the world of any and all liens and encumbrances and eligible for reinstatement and documentation as a vessel of the United States eligible for registry and trade endorsements.

41. The law of finds grants title to a finder against all the world except an owner. *Weeks v. Hackett*, 71 A.

858 (1908), cited in *Hener v. United States,* 525 F.Supp. 350 (S.D. N.Y. 1982).

42. Where a vessel is abandoned, the salvor in possession of said vessel who conducts a successful salvage becomes the owner of the vessel. Such a claim is properly within the scope of a salvage action. *Broere v. 2,133 Dollars,* 72 F.Supp. 115 (E.D. N.Y. 1947), cited in *Treasure Salvors and Armata Research Corporation v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* 408 F.Supp. 907, 908 (S.D. Fla. 1976).

43. General principles of maritime and international law dictate that an abandonment constitutes a repudiation of ownership, and that a party taking possession under salvage operations may be considered a finder under the doctrine of *animus revertendi,* i.e., the owner has no intention of returning. *Wiggins v. 1100 Tons, More or Less, of Italian Marble,* 186 F.Supp. 452, 456 (E.D. Va. 1960). Ownership of the vessel, then, vests in the finder of said vessel by operation of the law. *Richard v. Pringle,* 293 F.Supp. 981, 984 (E.D. N.Y. 1968) citing *Wiggins, supra.*

44. The doctrine of finds in admiralty is similar to that of the common law of personal property, but it is administered as an adjunct to the law of marine salvage, and has the same source. The concept is such that a person who finds maritime property that has been expressly or impliedly abandoned and has reduced it to possession, or has the capability of reducing it to possession, shall be awarded title thereto. *Treasure Salvors v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 640 F.2d 567, 568-571 (5th Cir. 1981).

45. A requirement of salvage is successful possession or control of property. The law of finds also requires

actual or constructive possession. *Hener v. United States,* 525 F.Supp. 350 (S.D. N.Y. 1982).

46. Usually, the object of salvage operations is owned by persons other than the salvor. The purpose and rules of the laws of salvage are designed to accord to the salvor a right to compensation not title. This is the case even with respect to "derelict" property which the law of salvage defines as property on navigable waters which is abandoned and deserted by those who are in charge of it. *Rowe v. The Brig,* F.Cas. 12,093 (C.C. Mass. 1818); *The Enulous,* F.Cas. 4480 (C.C. Mass. 1832); *Rickard v. Pringle,* 293 F.Supp. 981 (E.D. N.Y. 1968). Accordingly, the salvor of derelict property does not acquire full title unless no owner who can prove his title comes forward.

47. A salvor who can prove his title can claim only an increased award and cannot be charged as an interloper or trespasser. The term "abandonment" in salvage law means that the owner has lost the power to prevent salvage. The salvor has only a superior right to possession, not title, until the Court passes upon title and the salvage award. *Hener, supra,* at 356. The salvor has a right to possession and a maritime lien not to title, unless no one successfully claims title. *Brady v. Steamship African Queen,* 179 F.Supp. 312 (E.D. Va. 1960).

48. By comparison, the primary concern of the law of finds is title to the property. The finder can acquire title against all the world except an owner who shows non-abandonment. *Hener, supra,* at 354-355.

49. Under the concept of finds, as uniformly applied by the admiralty courts, a person who finds maritime property that is expressly abandoned and reduces it to possession or has present capability to

reduce the property to possession is awarded title to the property. *Id.* at 358-359.

50. Both the older and modern admiralty courts are clearly in accord with this principle in the case of long lost wrecks (over 100 years), openly abandoned property, and things found in seas or rivers that were the property of any person. *See,* A.M. Norris, Benedict on Admiralty: The Law of Salvage, pp.11-14 (7th Ed. 1980).

51. The law of admiralty is clear that a salvor has a valuable interest in his salvage, and in extraordinary cases, such as this one, where the property has been lost or abandoned for a very long period (126 years) the maritime law of finds supplements the possessory interest normally granted to a salvor and vests title by occupancy in one who discovers said abandoned property and reduces it to possession. *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 1990 A.M.C. 2409 (1990).

52. As the Fifth Circuit Court of Appeals said in the case of *Treasure Salvors, Inc. and Armada Research Corp. v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330 (1978):

> The court below correctly applied the law of finds. Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths. The law of salvage does not contemplate a different result. Salvage awards may include the entire derelict property. 569 F.2d at 338.

53. Further, if salvage is proved, the relief accorded, to the salvor is monetary compensation, not a reward in specie, unless no one claims ownership, in

which case title can be awarded to the salvor under the law of finds. *Platoro Limited, Inc. v. Unidentified Remains of a Vessel* 695 F.2d 893, 894 (5th Cir. 1983).

54. Clearly, then, as a matter of law, upon successful completion of the salvage recovery operation in the case at hand, the plaintiff is entitled to confirmation of title in the premises of the wreck as against all the world concerning the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo.

SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF

55. Paragraphs 1 through 35 are incorporated by reference in this Second Cause of Action as if fully set forth herein.

56. As the Court has jurisdiction over this matter under 28 U.S.C. 1333, the Court may declare the rights and other legal relations of any interested party seeking that declaration under the Declaratory Judgment Act, 28 U.S.C. 2201 *et. seq.*

57. Consistent with its status as priority salvor with, possession and custody (*in custodia legis*) of the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo, plaintiff requests that declaration be made by the Court of the salvor's rights to proceed with salvage on the wrecked vessel of the United States, THE BROTHER JONATHAN, her appurtenances, furniture and cargo and that the Court declare the rights and other legal relations of all interested parties in the *res*.

WHEREFORE, plaintiff prays:

1. That process issue *in rem*, according to the rules and practice of the Court in causes of admiralty and maritime jurisdiction and a warrant for the arrest of the vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo be served upon the substitute *res* within the custody and jurisdiction of the Court;

2. That an order of the Court authorize publication in a national and local newspaper of record in the vicinity of the site of THE BROTHER JONATHAN that all persons claiming an interest in the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo may be cited to appear and answer under oath the factual allegations in the complaint;

3. That the Court exercise *in rem* jurisdiction to enforce plaintiff's maritime lien for salvage, and for confirmation of possession and title in the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo;

4. That the Court issue an interlocutory declaration of the priority of plaintiff's salvage status and exclusive right of salvage and possession, and appoint the plaintiff custodian (*in custodia legis*) of the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo and all the artifacts recovered therefrom for the pendency of the salvage effort and until disposition by sale or otherwise;

5. That the Court retain jurisdiction for the duration of the salvage effort and pendency of the proceedings in this case for the protection of salvage priority within the custody of the plaintiff, including, among other things, declaring a 5200 foot radius safety zone around the salvage site which can be incorporated in a Notice to Mariners and reflected on oceanographic charts

of the area, and for such other parties and matters as they come before the Court, including any necessary preliminary and permanent injunctive relief available under Fed. Rules Civ. Proc. 65. *See, Indian River Recovery Company v. The China, Her Appurtenances, Etc.* 645 F. Supp. 141 (1989);

6. That the Court make a most liberal voluntary salvage award to plaintiff concurrent with the staged completion of successful recovery operations providing for annual sale or auction of that portion of the artifacts recovered and distribution of the proceeds of sale or auction in the defendant vessel, its appurtenances, furniture and cargo;

7. That the Court confirm title and the residue of the *res* after a liberal salvage award, including the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo under the admiralty law of salvage and the common law of finds, against all the world and confirm title free and clear of any and all liens and encumbrances eligible for reinstatement of documentation as a vessel of the United States eligible for registry and trade endorsements:

8. That final judgment be rendered for plaintiff in the amount of its salvage claim confirming possession and title upon the salvor and finder in the *res derelictae* consisting of the defendant vessel THE BROTHER JONATHAN, its appurtenances, furniture and cargo and all artifacts recovered therefrom, with interest (if the *res* is subsequently sold) and costs, including attorneys' fees, and that the defendant vessel, its appurtenances, furniture and cargo may be condemned and sold to pay the same, or title awarded as the plaintiff requests herein. (*See, Cobb Coin Company, Inc. v. Unidentified Wrecked*

and Abandoned Sailing Vessel 549 F.Supp. 540 (S.D. Fla. 1982); *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel* 556 F.Supp. 1319 (S.D. Fla. 1983)); and,

9. That the Court formally declare the rights and other legal relations of any interested party in the *res* under 28 U.S.C. 2201, *et seq.*;

10. For any such further relief as justice and equity may require and as the Court considers just and proper.

DATED: October 17, 1991

Plaintiff, by its attorneys

By /s/ Bradford W. Lomas
BRADFORD W. LOMAS
GORDON & REES
275 Battery Street, 20th Floor
San Francisco, California 94111

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

VERIFICATION

I, Donald Knight, being duly sworn, deposes and says:

1. I am the president of DEEP SEA RESEARCH, INC., the plaintiff herein.

2. I have read the foregoing Complaint and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated upon

information and belief, and as to those matters, I believe them to be true.

3. I make this verification on behalf of DEEP SEA RESEARCH, INC., a California corporation of which I am an officer.

/s/ Donald Knight
Donald Knight

Subscribed and sworn to before me
this 18th day of October, 1991.

/s/ Donald C. Nardella
Notary Public

(Seal) OFFICIAL SEAL
DONALD C. NARDELLA
NOTARY PUBLIC – CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires July 9, 1993

My Commission expires:
July 9, 1993

SUMMONS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC.

V.

THE BROTHER JONATHON [sic], her appurtenances, furniture, cargo, etc.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: C 91 3899 CAL

TO: (Name and Address of Defendant)

Charles Warren
Commissioner, California State Lands Commission
1807 13th Street
Sacramento, CA 95814

YOU ARE HEREBY SUMMONED and required to file with the clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Bradford W. Lomas, State Bar No. 37477
Gordon & Rees
275 Battery Street, 20th Floor
San Francisco, CA 94111

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

COPIES OF NOTICE OF RIGHT TO DISPOSITION BY A MAGISTRATE ATTACHED to ALL SUMMONS COPIES

[Illegible] — NOV 1, 1991
CLERK — DATE

[Illegible]
BY DEPUTY CLERK

JS 44
(Rev. 07/89)

CIVIL COVER SHEET

(Filed Nov. 4, 1991)

The JS-44 civil cover sheet and the information contained [illegible] replace nor supplement the filing and service of pleadings on other [illegible] as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

DEEP SEA RESEARCH, INC.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

VENUE: SAN FRANCISCO X
SAN JOSE ____

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

GORDON & REES
275 Battery Street, 20th Floor
San Francisco, CA 94111
Telephone (415) 986-5900

DEFENDANTS

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT ____ (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

____	1	U.S. Government Plaintiff
____	2	U.S. Government Defendant
X	3	Federal Question (U.S. Government Not a Party)
____	4	Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES
(PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

(For Diversity Cases Only)

	PTF		DEF	
Citizen of This State	____	1	____	1
Citizen of Another State	____	2	____	2
Citizen or Subject of a Foreign Country	____	3	____	3
Incorporated or Principal Place of Business in This State	____	4	____	4
Incorporated and Principal Place of Business in Another State	____	5	____	5
Foreign Nation	____	6	____	6

IV. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

This is an in rem action in admiralty to have rights declared as to an abandoned shipwreck. Jurisdiction is proper under Rule 9(h) of the Federal Rules of Civil Procedure and 28 U.S.C. 1333.

V. NATURE OF SUIT
(PLACE AN x IN ONE BOX ONLY)

X 890 Other Statutory Actions

* * *

VI. ORIGIN *(PLACE AN x IN ONE BOX ONLY)*

X	1	Original Proceeding
_____	2	Removed from State Court
_____	3	Remanded from Appellate court
_____	4	Reinstated or Reopened
_____	5	Transfered from another district (specify)
_____	6	Multidistrict Litigation
_____	7	Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
_____ UNDER F.R.C.P. 23

DEMAND $ Salvage award and equitable relief

Check YES only if demanded in complaint:

JURY DEMAND: _____ YES X NO

VIII. RELATED CASES(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE 11/2/91 SIGNATURE OF ATTORNEY OF RECORD
/s/ Robert D. Ryan

UNITED STATES DISTRICT COURT

_____

ORDER REGARDING STATUS CONFERENCE AND OTHER PROCEDURES

UNITED STATES DISTRICT OF
NORTHERN DISTRICT OF CALIFORNIA

NO. C 91 3899 CAL

(ORIGINAL FILED NOV. 1, 1991)

ORDER REGARDING STATUS CONFERENCE AND OTHER PROCEDURES

The above-entitled action has been assigned to United States District Judge Charles A. Legge, Courtroom No. 10, 19th Floor, 450 Golden Gate Avenue, P.O. Box 36060, San Francisco, California 94102.

IT IS ORDERED THAT:

A status conference pursuant to Rule 235-3 of the local rules of this court, and a pre-trial and discovery conference pursuant to Rules 16(a), (b), (c), and 26(f) of the Federal Rules of Civil Procedure, are scheduled for 11:00 o'clock on 01-31-92 .

Counsel are directed to confer in advance of that conference with respect to each of the subjects enumerated in those rules. Not less than ten days prior to that conference, counsel are to submit, jointly if possible, a status conference statement briefly covering each of those subjects. Each party is to be represented at the conference by counsel prepared to address those subjects. Representatives of the parties may but are not required to attend. At the conference, an order may be entered directing the future proceedings in this action.

Any request to reschedule the above dates should be made, by stipulation if possible, in writing not less than ten days before the date of the conference.

Law and motion matters will be heard on Fridays at 9:30 a.m. Counsel are referred to the local rules of this court with respect to motion procedures.

After counsel have complied with Rule 230-4(a) of this court, Judge Legge will be available to participate in chambers or telephone conferences to attempt to resolve disputed discovery issues expeditiously and economically, pursuant to Local Rule 230-4(e).

Plaintiff is directed to serve copies of this order on all parties to this action and all parties subsequently joined, in accordance with Rules 4 and 5 of the Federal Rules of Civil Procedure. Following service, plaintiff is to file a certificate of service with the Clerk of the Court.

/s/ Charles A. Legge
CHARLES A. LEGGE
UNITED STATES
DISTRICT JUDGE

STUART M. GORDON, State Bar No. 37477
BRADFORD W. LOMAS, State Bar No. 115043
ROBERT D. RYAN, State Bar No. 148612
GORDON & REES
275 Battery Street, 20th Floor
San Francisco, CA 94111
Telephone (415) 986-5900

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC. Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendants.	No. C 91 3899 CAL PROOF OF SERVICE BY MAIL

I, ROBERT D. RYAN, declare:

I am an associate with the law firm of Gordon & Rees, employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 275 Battery Street, 20th Floor, San Francisco, California 94111.

On November 6, 1991, I served the following documents: A booklet distributed by the United States District Court, entitled *Dispute Resolution Procedures in the Northern District of California,* the *Summons in a Civil Action,* the *Civil Cover Sheet,* the *Verified Complaint,* and *Order Regarding Status Conference and Other Procedures* (signed by Charles A. Legge, United States District Judge), by placing a true and correct copy of each in a sealed envelope with postage thereon fully prepaid, in the mail at San Francisco, California addressed as follows:

Charles Warren, Commissioner
CALIFORNIA STATE LANDS COMMISSION
1807 – 13th Street
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 6, 1991 at San Francisco, California.

/s/ Robert D. Ryan
ROBERT D. RYAN

NOTICE OF MOTION AND MOTION TO INVERVENE

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Attorneys for Proposed Intervenor,
State of California, State Lands Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her Appurtenances, furniture, cargo, etc., Defendant,	No. C 91 3899 CAL NOTICE OF MOTION AND MOTION TO INTERVENE Fed. R. Civ. Pro. 24(a) and 24(b)

STATE OF CALIFORNIA, STATE LANDS COMMISSION,
Intervenor.

TO PLAINTIFF AND HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on January 31, 1992, in the courtroom of the Honorable Charles A. Legge, Judge of the United States District Court for the Northern District of California, at 9:30 a.m. or as soon thereafter as the matter can be heard, the State of California, State Lands Commission (hereafter referred to as "California" or "the State") will move this Court, pursuant to Rule 24 (a) and (b) of the Federal Rules of Civil Procedure, for leave to intervene in this action, solely to make a restricted appearance asserting its immunity to suit under the 11th Amendment of the United States Constitution, and to file a motion to dismiss.

Intervention is sought on the following grounds:

1. California is entitled to intervene as a matter of right, pursuant to Rule 24(a).

(a) The State has a direct and substantial interest in the property (The BROTHER JONATHAN) which is the subject of this action. The State claims ownership and exercises regulatory authority over abandoned shipwrecks within the territorial waters of California, and its ownership and the exercise of its authority is directly implicated by the complaint in this action. The complaint attempts to circumvent the authority of the State to protect its cultural resources and to regulate salvage activities in the territorial waters of the State of California.

(b) Disposition of this action without consideration of the State's interest in the property and authority to regulate the activities contemplated by the complaint will impair or impede the State in its proper governmental function and cause the loss of the ability to manage State sovereign and proprietary property.

(c) The interests of the State will not be adequately represented by the present parties to the action.

2. In addition, California should be permitted to intervene pursuant to Rule 24(b) because the proposed motion to dismiss raises questions of law and fact which are common to those in the main action and because intervention will not unduly delay or prejudice the right of the plaintiff and will promote the interests of justice.

This motion is based on this notice, the file and record of this action, and the Memorandum and Declarations in Support of the Motion to Intervene which has been filed concurrently with this notice and motion.

WHEREFORE, the proposed intervenor respectfully request [sic] that this motion be granted.

DATED: December 30, 1991

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General of the State of California
JAN S. STEVENS, Acting Assistant Attorney-General
JOSEPH C. RUSCONI, Deputy Attorney General
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JOINT STATUS CONFERENCE STATEMENT

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DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC.,	No. C 91 3899 BAC
Plaintiff,	JOINT STATUS CONFERENCE STATEMENT
vs.	
THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,	Status Conference: February 22, 1994 Time: 2:30 p.m.
Defendants,	
STATE OF CALIFORNIA, STATE LANDS COMMISSION, GOVERNMENT OF THE UNITED STATES OF AMERICA,	
Intervenors.	

The parties to the above-referenced case, by and through their respective counsel, hereby submit the following Joint Status Conference Statement:

1. Plaintiff DEEP SEA RESEARCH, INC. is represented by Fletcher C. Alford of the law offices of Gordon & Rees. Intervenor State of California is represented by Peter Pelkofer, of the State Lands Commission. Intervenor Government of the United States of America is represented by Barbara B. O'Malley, of the Department of Justice.

2. The complaint in this case was filed on November 1, 1991. By order dated March 20, 1992, the State of California was permitted to intervene in this action pursuant to FRCP 24(a) and (b)(2). By stipulated order dated April 16, 1992, the United States was also permitted to intervene herein.

3. This action was dismissed without prejudice, by stipulation of the parties, on or about June 19, 1992. It was reopened by stipulation of the parties on or about February 4, 1994.

4. Plaintiff DEEP SEA RESEARCH, INC. contends that this action falls within the admiralty and maritime jurisdiction of the Court, as set forth in Article III, Section 2 of the United States Constitution and 28 U.S.C. §1333. Plaintiff DEEP SEA RESEARCH, INC. filed this action to establish its rights as a salvor with respect to The Brother Jonathan, a ship-wrecked vessel resting on the ocean floor off the coast of Crescent City, California.

5. The State of California has intervened in the action, contending that The Brother Jonathan is an abandoned historic shipwreck embedded in the subsurface of the territorial sea, and that it is owned by the State of

California, under the provisions of the Abandoned Shipwreck Act, 43 U.S.C. §2101 et seq. (hereinafter "the Act"), and state law including California Public Resources Code §§6309, 6313, and 6314. Plaintiff DEEP SEA RESEARCH, INC. contends that the Act does not apply, and that in any event, it is unconstitutional insofar as it purports to divest the federal courts of the admiralty and maritime jurisdiction conferred upon them by Article III, Section 2 of the United States Constitution. The United States has intervened in this action to defend the constitutionality of the Act.

6. Plaintiff intends to file a motion asking the Court to appoint it sole and exclusive salvor of The Brother Jonathan, under the principles of traditional admiralty and maritime law. The State of California will file a motion to dismiss, contesting the jurisdiction of this court to hear this matter under the provisions of the Act, and on the basis that this action is essentially one against the state to which the state has not consented nor waived its 11th Amendment immunity to suit. The United States intends to file a brief in support of the constitutionality of the Act.

7. The parties hereby stipulate to the following briefing schedule:

a. April 1, 1994 – Intervenor State of California's motion to dismiss; Plaintiff's motion to appoint it sole and exclusive salvor of The Brother Jonathan, due;

b. May 3, 1994 – Opposition of plaintiff to motion to dismiss; State's opposition to plaintiff's motion to be appointed sole and exclusive salvor, due;

c. June 2, 1994 – Brief of the United States in support of the constitutionality of the Abandoned Shipwreck Act; State's reply to the plaintiff's opposition to

motion to dismiss; plaintiff's reply to State's opposition to motion to be appointed sole and exclusive salvor, due;

d. July 1, 1994 – Reply of plaintiff to brief of the United States, due;

e. September 9, 1994 at 10:00 a.m. – Hearing before Judge Barbara Caulfield on motions.

Dated: February 14, 1994 GORDON & REES

By: /s/ Fletcher C. Alford
Fletcher C. Alford

Attorneys for
Plaintiff
DEEP SEA
RESEARCH, INC.

Dated: February 14, 1994 STATE LANDS
COMMISSION FOR
THE STATE OF
CALIFORNIA

By: /s/ Peter Pelkofer
Peter Pelkofer

Attorneys for
Intervenor
STATE LANDS
COMMISSION FOR
THE STATE OF
CALIFORNIA

Dated: February ___, 1994 UNITED STATES
OF AMERICA

By: _____
Barbara B. O'Malley

Attorneys for
Intervenor
UNITED STATES
OF AMERICA

ORDER GRANTING MOTION TO INTERVENE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her Appurtenances, furniture, cargo, etc., Defendant, STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor.	No. C 91 3899 BAC ORDER GRANTING MOTION TO INTERVENE (Filed Mar. 20, 1992)

The California State Lands Commission (the "State") seeks permission to intervene in the above-captioned action pursuant to Rule 24 of the Federal Rules of Civil Procedure. The State asserts an interest in Brother Jonathan, an abandoned shipwreck vessel, the title and control of which is the subject of plaintiff's admiralty *in rem* action. The State claims its interest pursuant to 43 U.S.C. §§ 2101-2106, the Abandoned Shipwreck Act (the "ASA"), and California Public Resources Code § 6313. According to the State, Brother Jonathan is embedded in the subsurface of submerged state lands and is eligible for the National Register. The

State maintains that these two conditions grant it title to the vessel under both the ASA and § 6313. After careful consideration of the parties rights and interests in this matter, the court GRANTS the State's motion to intervene.

I. INTERVENTION OF RIGHT

To establish a right to intervene in this action under Rule 24(a), the State must establish that it: (1) filed a timely motion; (2) asserts an interest relating to the property or transaction which is the subject of the action; (3) is so situated that without intervention, disposition of the action may impair or impede the ability to protect that interest; and (4) asserts an interest that is inadequately represented by existing parties. *California v. Tahoe Regional Planning Agency*, 792 F.2d 775 (9th Cir. 1986); *aff'd, Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. U.S.*, 921 F.2d 924 (9th Cir. 1990).

Timeliness is to be evaluated in light of the circumstances. *Atkins v. State Board of Education of North Carolina*, 418 F.2d. 874, 876, (4th Cir. 1969). As soon as a prospective intervenor knows or has reason to know that his interest might be adversely affected by the outcome of litigation, he must move promptly to intervene. *U.S. v. South Bend Community School Corp.*, 710 F.2d 394 (7th Cir. 1984), *cert. denied, Brookins v. South Bend Community School Corp.*, 466 U.S. 926, 80 L.Ed.2d 181, 104 S.Ct. 1707. The State received written notice of his action on November 8, 1991, contacted plaintiff's counsel within twenty (20) days, and filed this motion on January 2, 1992. The State's application was therefore timely.

The State asserts an interest in the vessel Brother Jonathan pursuant to the ASA. Under this statute, title to any abandoned vessel is vested in the United States if the vessel is a) submerged in the lands of a State or b) on submerged lands of a State and determined eligible for inclusion in the National Register. 43 U.S.C. §2105(a). Such title is transferred to any State in or on whose submerged lands the shipwreck is located. 43 U.S.C. §2105(c). In addition, California law provides that title to all abandoned shipwrecks on or in submerged lands of California is vested in the state. California Public Resources Code §6313.

The State offers evidence that Brother Jonathan is embedded in the subsurface of the Pacific Ocean and is within the territorial sea of the State of California. It also maintains that the craft is eligible for inclusion in the National Register. The State has thus demonstrated its interest in Brother Jonathan, the subject of this action.

Plaintiff seeks salvage and salvor's possessory rights and title to Brother Jonathan under general maritime law. Since the State also asserts a possessory interest in the vessel, the State's ability to protect that interest may, as a practical matter, be impeded if the State does not intervene in this matter. Plaintiff, whose interests are adverse to those of the State, is the only existing party in this *in rem* action. Thus, if the State is excluded from this action, its interests will [sic] be not be represented.

Plaintiff's only argument in opposition to the State's motion to intervene is that the ASA is unconstitutional. The court need not address the issue of whether the ASA is constitutional, however, because, the State also asserts a legitimate interest in Brother Jonathan pursuant to

California statute. The State has satisfied all the requirements of Rule 24(a) and is entitled to intervention of right in the present action.

II. PERMISSIVE INTERVENTION

Even if the State were not entitled to intervention as of right, the State would be entitled to permissive intervention under Rule 24(b)(2), because its claim has questions of law and fact in common with the main action. Barring undue prejudice or delay to plaintiff, State intervention is permissible under 24(b)(2). Plaintiff will not be unduly prejudiced nor will adjudication of its claim be significantly delayed by the State's intervention in this action because the State asserts an interest which the court must weigh when evaluating plaintiff's request. If Brother Jonathan does meet the requirements of 43 U.S.C. § 2105 as the State asserts, plaintiff's claim must be denied pursuant to 43 U.S.C. § 2106(a), which states: "The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which § 2105 of this title applies." Judicial economy is thus better served by allowing plaintiff and the State to litigate the matter together in the current action.

III. CONCLUSION

For the foregoing reasons, the State's motion to intervene is GRANTED.

IT IS SO ORDERED.

Dated: March 20, 1992

/s/ Barbara A. Caulfield
Barbara A. Caulfield
United States District Judge

RESTRICTED APPEARANCE AND MOTION TO DISMISS OF STATE OF CALIFORNIA, STATE LANDS COMMISSION

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant.	C 91 3899 BAC RESTRICTED APPEARANCE AND MOTION TO DISMISS DATE: September 9, 1994 TIME: 10:00 a.m. JUDGE: Honorable Barbara A. Caulfield

STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor.	
UNITED STATES OF AMERICA, Intervenor.	

TO PLAINTIFF AND HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that in accord with the order, dated February 25, 1994, of the Honorable Barbara A. Caulfield, Judge of the District Court, Intervenor, State of California, State Lands Commission (hereafter referred to as "State") makes a Restricted Appearance, and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure moves to dismiss this action for lack of the Court's jurisdiction on the basis that: (1) the subject of the suit (Brother Jonathan) is an abandoned shipwreck, eligible for inclusion in the National Register of Historic Place, embedded in the subsurface of the territorial waters of California, and the Court lacks jurisdiction to determine a claim of salvage or finds concerning it under the Abandoned Shipwreck Act (43 U.S.C. 2101-2106) and, (2) the action is essentially an action against the State to which the State has not consented nor waived its Eleventh Amendment immunity to suit.

This motion is based on this notice, the file and records of this action, the Request for Judicial Notice, the Memorandum in Support of this Motion and the Affidavits in Support of the Motion to Intervene previously filed with the Court.

DATED: March 31, 1994

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General of the State of California
JAN S. STEVENS, Acting Assistant Attorney General
JOSEPH C. RUSCONI, Deputy Attorney General
ROBERT C. HIGHT, Chief Counsel
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MEMORANDUM IN SUPPORT OF RESTRICTED APPEARANCE AND MOTION TO DISMISS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant.	C 91 3899 BAC MEMORANDUM IN SUPPORT OF RESTRICTED APPEARANCE AND MOTION TO DISMISS DATE: September 9, 1994 TIME: 10:00 a.m. JUDGE: Honorable Barbara A. Caulfield

STATE OF CALIFORNIA, STATE LANDS COMMISSION,

Intervenor.

UNITED STATES OF AMERICA,

Intervenor.

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I. PRELIMINARY STATEMENT

Deep Sea Research, Inc. (hereafter referred to as "Deep Sea") filed this action on November 1, 1991, in Admiralty, seeking an award "for salvage and a salvor's possessory rights and for confirmation of title in salvage and finds, and for maritime declaratory relief under general maritime law" (Complaint of Deep Sea Research page 1, Lines 19-22). The State of California, State Lands Commission (hereafter referred to as "State" or "California") filed a Motion to Intervene, which was granted on March 13, 1992. (Order of the Honorable Barbara A. Caulfield, dated March 20, 1992.)

The State now moves this Court for an order dismissing this action on two independent grounds:

First, the Defendant, the BROTHER JONATHAN is an abandoned shipwreck, eligible for inclusion in the National Historic Register, embedded in the subsurface of the territorial waters of the State of California, and as such the Abandoned Shipwreck Act deprives a federal court of jurisdiction to adjudicate a claim to such a ship based on the law of salvage and the law of finds. (43 U.S.C. 2106(a))

Second, Plaintiff's action is a suit against the State from which it is immune under the Eleventh Amendment to the United State Constitution. The State has both a proprietary interest in the vessel and a regulatory interest in salvage activities in the States's territorial waters. Those interests would be impeded or impaired by the Court's determination of the issues raised by Deep Sea's Complaint. The State is an indispensable party and a determination absent a consideration of the State's interest will provide an inconclusive result.

The State's interest is based on the confirmed ownership of the lands in which the vessel is embedded. (Submerged Lands Act, 43 U.S.C. 1301) it is also based on its asserted title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California. (California Public Resources Code, Section 6313) Additionally, the State asserts a regulatory interest in the subject matter of the action, (the salvage of a historic shipwreck from its territorial sea) based on its public trust responsibilities and its sovereign police power as specifically expressed in the Public Resources Code Sections 6309, 6313 and 6314.

II. FACTUAL BACKGROUND

A. STATE LANDS COMMISSION

The State Lands Commission is an agency of the State of California created by an act of the California Legislature in 1938 and consists of the Controller, the Lieutenant Governor, and the Director or Finance. (California Public Resources Code Section 6101) The Commission has jurisdiction over and the public trust responsibility to manage and protect California's natural and cultural resources on approximately 4.5 million acres of state lands, including the submerged lands which lie beneath the territorial sea. (California Public Resources Code, Division 6, Parts 1, 2, and 3)

The Commission's responsibility with regard to State submerged lands is more than a naked authority to regulate conferred by the Legislature. It is shaped by the Public Trust Doctrine, which limits and defines the uses of sovereign land. The Public Trust Doctrine is derived from the ancient concept that navigable waters, their beds and their banks, should be enjoyed by all the people because they are too important to be reserved for private use. (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387)

Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. In *Marks v. Whitney* (1971) 6 Cal. 3d 251, the California Supreme Court, after reference to the historic public trust uses of navigation, commerce and fisheries, recognized that the Public trust was broad enough to encompass other uses such as, swimming, boating and general recreation and concluded that the doctrine was sufficiently flexible to accommodate changing public needs. It noted that "there is a growing public recognition that one of the most

important public uses of [public trust lands] is the preservation of those lands in their natural state". (*Marks, supra,* pp. 259-260) California has chosen to protect and preserve the natural and cultural resources contained in its submerged lands. (See Cal. Pub. Res Code §§ 6309, 6313, 6314.) California has specifically chosen to protect historic shipwrecks. Plaintiff's efforts to obtain exclusive use of a significant cultural resource which belongs to the people of California is in direct conflict with the Commission's authority to exercise its public trust responsibilities.

B. THE BROTHER JONATHAN

The BROTHER JONATHAN, struck a huge rock and sank July 30, 1865, while returning to the harbor at Crescent City, California. She was two days out of San Francisco enroute for Portland and Vancouver. The heavy weather and high seas had made the passengers ill and, because of that and poor visibility Captain S.J. DeWolf decided to seek shelter. On July 30, 1865, the following telegram arrived at the offices of the California Steam Navigation Co. in San Francisco:

> Steamer Brother Jonathan struck rock off St. Georges Point 8 or 10 miles NW from Crescent City, about half past one o'clock P.M. today, and went down about 45 minutes afterwards, and all on board are supposed to be lost, except 17 adults and three children, who came ashore with me in the ship's lifeboat at this place about 5 o'clock P.M. All the boats at this place have gone to the rescue. No hope of saving anyone. Two boats swamped alongside of the ship, there were three boats left on the steamer. Passengers

cared for by the citizens here. 8 o'clock, boats returned, and nothing seen of wreck, We have given up all hopes.

signed . . . James Patterson
3rd Officer

(Don B. Marshall, "California Shipwrecks, Footsteps in the Sea", Superior Publishing Co., Seattle 1978)

The ship lies embedded in the bottom surface in some 200 feet of water at Latitude: 41 deg. 47' 20" N, Longitude: 124 deg. 20' 46" W, approximately 3 and 1/2 nautical miles west of Point St. George and *within* the State's territorial or marginal sea. (See the Affidavit of Roy H. Minnick filed in Support of the Motion to Intervene dated December 31, 1991; copy filed herewith in support of motion to dismiss.)

III. RESTRICTED APPEARANCE

A state may make a restricted appearance to claim its sovereign immunity and request dismissal of an admiralty action in rem which is based on a claim of salvage and finds of an abandoned historic vessel located in its territorial waters. (*Marx v. Guam and Two wrecked and Abandoned Vessels* (9th Cir. 1989) 866 F.2d 294 at 297)

In the *Marx* case, Robert Marx and several other treasure hunters applied to Guam for exploration and recovery permits for two sunken Spanish galleons. Guam issued an exclusive permit to another applicant. Marx did not challenge Guam's decision in Guam's territorial Court, but instead filed an in rem action in the District Court seeking title under the law of finds or an award under the law of salvage. Guam made a special appearance for the limited purpose of moving for an order of

dismissal based on its sovereign immunity under the Eleventh Amendment. The District Court denied the motion and Guam appealed.

Marx argued to the District Court that Guam lacked standing because Guam failed to file a claim pursuant to Supplemental Admiralty Rule C(6) which requires a "claimant" to file a claim in an admiralty in rem action. On appeal, the Ninth Circuit Court of Appeals found that Guam, by specially appearing, "did not assume the position of a normal defendant nor seek to adjudicate its claim to the sunken vessels. Instead it relied on cases which have permitted governments to assert an immunity defense and move to dismiss without filing C(6) claims." (*Marx, supra,* p. 297)

The factual situation in our case is an almost exact duplicate of *Marx.* Deep Sea's president, Donald Knight, operating as another corporate entity (Sea Epics Research, Inc.) applied to the State for and was initially granted a permit to conduct salvage operations on the BROTHER JONATHAN. The State, however, never issued the permit and it was later revoked for his failure to comply with a number of required conditions including the failure to obtain insurance, a bond, and to develop a work plan which would protect the historic ship. (State Lands Commission Official File W 23867) Rather than seek to meet the State's requirements, he formed another corporation and filed this action. California, as did Guam, intervened to protect its sovereign interest.

The Ninth Circuit Court of Appeals concluded "that [Guam's] reliance [on a special appearance] was reasonable". (*Marx, supra,* p. 297) As in *Marx* it is clear that

the State may make a restricted appearance to claim sovereign immunity and request dismissal of this action.

IV. CALIFORNIA'S SUBMERGED LANDS

State submerged lands are sovereign public trust lands, acquired by California as an incident of sovereignty upon admission to the Union. (Act for the Admission of California into the Union, Vol. 9, Stats. at Large, p. 452; *Borax, Ltd. v. Los Angeles,* (1935) 296 U.S. 10, 15-16) Submerged lands are defined by California law as those lands lying seaward of the line of mean low tide. (*City of Long Beach v. Mansell* (1970) 3 Cal 3d 462, 478 fn.28)

The State asserts that the BROTHER JONATHAN, is "in or on" the submerged lands of the State of California. Submerged lands [as defined in the Abandoned Shipwreck Act] are "lands beneath navigable waters". (Section 2 of the Submerged Lands Act, 43 U.S.C. 1301)

The Submerged Lands Act was enacted by Congress "to confirm and establish the titles of the States to lands beneath navigable waters within state boundaries" . . . (Introduction to the Submerged Lands Act, Public Law 31, 83rd Congress, 1st Session, 67 Stat.29, 1953). By enacting the Submerged Lands Act, Congress was responding to the decisions of the U. S. Supreme Court in *U.S. v. California* (1947) 332 U.S. 19; *U.S. v. Louisiana* (1950) 339 U.S. 699 and; *U.S. v. Texas* (1950) 339 U.S. 707, which found the paramount interest in the lands beneath the territorial sea to be in the United States. These Supreme Court decisions, like a series of Federal Court decisions that preceded the enactment of the Abandoned Shipwreck Act, provided the impetus for states to seek Congressional relief. In both situations the

court decisions seriously impinged on the ability of states to manage resources that existed on or in state submerged lands.

Congress determined that an effective means of protecting and preserving abandoned historic shipwrecks was to claim ownership of them under the common law doctrine of sovereign prerogative and then transfer that ownership to the states. In exercising its sovereign prerogative Congress was careful to provide that the geographic scope of the Abandoned Shipwreck Act was consistent with the United States claims of territorial sovereignty. The Committee on Merchant Marine and Fisheries noted in its analysis that, "the term, "submerged lands" set forth in section 3(f) is not intended to constitute an assertion of U.S. sovereignty under international law beyond the currently recognized U.S. territorial sea limit". (U.S. House of Representatives Report No. 100-514, Pt. 2, P. 5)

California, because of its irregular coastline, large bays and offshore islands required special consideration to determine the boundaries of its internal waters and extent of its territorial sea. In its decree of October 27, 1947 in *U.S. v. California,* the Supreme Court reserved jurisdiction "to enter such further orders and to issue such writs as might from time to time be necessary". (332 U.S. 19, at 804, 805)

The Court appointed a special master to consider boundary questions and review evidence presented by the parties. In a Supplemental Decree ((1966) 382 U.S. 448) the Court confirmed the recommendations of its special master. He had defined "coastline" (the point at which measurement of the territorial sea begins) as "the line of mean lower low water on the mainland, [or] on

[an] island . . . "; and defined "island" as "a naturally formed area of land surrounded by water, which is (and always remains) above the level of mean high water".

Southwest Seal Rock, rising 45 feet above the water level at mean high water, Latitude 41 deg. 48' 50" N. Longitude 124 deg. 21' 5" W is an island as defined by the Supreme Court in that it is "above the level of mean high water". A circle with a three mile radius and with its center at Southwest Seal Rock encompasses the location of the BROTHER JONATHAN (Lat. 41 deg. 47' 20" N, Long. 124 deg. 20' 46" W) and places it within the state's territorial waters. An arc of this circle comprises the (state/federal) agreed upon outer limit of the territorial sea, as depicted on National Oceanic Administration Chart #18600 and on the Bureau of Land Management Outer Continental Shelf Official Protraction Diagram, NK 10-7, Crescent City. (Affidavit of Roy H. Minnick, filed in support of Motion to Intervene dated December 31, 1991.)

V. TITLE TO THE BROTHER JONATHAN

In enacting the Abandoned Shipwreck Act, Congress asserted title on behalf of the United States to three classes of abandoned shipwrecks in territorial waters: (1) those embedded in submerged lands of a state; (2) those embedded in coralline formations protected by a state on submerged lands of a state; and (3) those on submerged lands of a state and included or determined eligible for inclusion in the National Register of Historic Places. (43 U.S.C. 2105(a)) Title to these shipwrecks was then transferred to the State in whose waters they lie. (43 U.S.C. 2105(c))

The BROTHER JONATHAN is "embedded" within the meaning of that term as defined in the Act. (43 U.S.C. 2102(a)) The BROTHER JONATHAN is eligible for inclusion in the National Register of Historic Places. (43 U.S.C. 2101(c)) (See the affidavit's of Goodyear Walker and John Foster filed in Support of the Motion to Intervene dated December 31, 1991; copy filed herewith is [sic] support of motion to dismiss.) California asserts title to the BROTHER JONATHAN under the Abandoned Shipwreck Act of 1987. (43 U.S.C. 2101-2106) As the BROTHER JONATHAN is both "embedded in the submerged land of a State" and "eligible for inclusion in the National Register of Historic Places", the Abandoned Shipwreck Act transferred the title to the BROTHER JONATHAN as held by the United States to the State of California.

Plaintiff, Deep Sea, seeks title to THE BROTHER JONATHAN or alternatively to a salvage award under the law of finds and the law of salvage. Neither the law of salvage nor the law of finds is applicable to shipwrecks to which the Abandoned Shipwreck Act applies. (43 U.S.C. 2106(a))

California asserts "title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California. All abandoned and all submerged archaeological sites and submerged historic resources of the State are in the custody and subject to the control of the State Lands Commission for the benefit of the people of the State of California". (California Public Resources Code Section 6313(a)) As an independent ground for ownership of the BROTHER JONATHAN, California also asserts title, under California Public Resources Code Section 6313(a).

VI. THE STATE'S REGULATORY AUTHORITY OVER SUBMERGED LANDS

The State has regulatory authority over the submerged lands of its territorial sea, "the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law . . . ". (43 U.S.C. 1311(a)(2)) As a sovereign state California may regulate activities within its territorial jurisdiction, so long as its regulation does not conflict with basic constitutional principles or areas of federal exclusivity. In a recent case, *Beveridge v. Lewis,* (1991) 939 F.2d 859, the Ninth Circuit Court of appeals denied an appeal of boat owners from a dismissal of their claim for injunctive relief. The boat owners claimed a right to anchor freely in territorial waters and that a City ordinance which prohibited mooring or anchoring during certain months was preempted by federal regulation. The Court first reviewed the two ways in which preemption of a State regulatory statute can occur absent express Congressional preemption language as set out in *Ray v. Atlantic Richfield, Co.* (1978) 435 U.S. 151:

> "First, Congress may *implicitly* occupy a field through pervasive regulation that leaves no room for states to supplement [it] or through the federally sensitive nature of the particular subject area. (e.g. foreign affairs). Second, even if it does not implicitly occupy a field, federal law preempts local regulation where there is an *actual conflict.* (*Beveridge, supra,* p. 862)
>
> (emphasis in original)

The Court then went on to hold that the Santa Barbara ordinance failed neither test and had not been preempted. (*Beveridge, supra,* p. 865)

Under its sovereign police power, California has enacted statutes which provide for procedures to issue permits and control the conduct of salvage operations in waters under its jurisdiction. (Public Resources Code Section 6309) The State in exercising its regulatory authority and trust responsibilities recognized "California's rich and varied maritime history" and that "technical innovation is making the submerged lands of the State more accessible each year" which requires regulation and administration "to preserve and protect the underwater cultural resources of the State". (Legislative findings and declarations of Chapter 732, Cal. Stats. of 1989)

The Supreme Court has often considered and approved of a states [sic] exercise of jurisdiction in (and beyond) the territorial sea, even over a subject matter in which the Federal government has an acknowledged interest. See *Skiriotes v. Florida* (1941) 313 U.S. 69, prohibition of the use of diving gear to harvest sponges; *State of Alaska v. Arctic Maid* (1961) 366 U.S. 199, taxing the taking of fish from territorial waters for processing in freezer ships anchored outside the territorial sea; *Reubin O'D. Askew v. The American Waterwave Operators, Inc.* (1973) 411 U.S. 325, upholding the constitutionality of Florida's oil spill liability statute and noting, "state regulation is permissible in the admiralty area, even though Congress has acted in the same area, absent a clear conflict of state and federal law".

Since the Abandoned Shipwreck Act transferred title to all qualifying ships to the State of California, the State

regulatory scheme codified in Public Resources Code sections 6309, 6313 and 6314 can neither implicitly nor actually conflict with any federal regulatory scheme. The State had not been preempted from enacting its own regulatory process over abandoned ships in its territorial waters.

VII. ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment applies to admiralty in rem proceedings. (*In re New York(I)*, (1921) 256 U.S. 490, and *In re New York (II)* (1921) 256 U.S. 503). These matter [sic] arose out of a claim in the death of an individual alleged due to the negligent operation of the tug *Queen City*. A libel in admiralty was filed in the District Court of New York and the Attorney General of the State of New York appeared specially for the purpose of questioning the jurisdiction of the court. The District Court ruled there was no proof of state ownership and ordered the vessel arrested. On petition for a Writ of Prohibition the Supreme Court held that the assertion of the Attorney General was a sufficient interest to invoke the Eleventh Amendment and bar the in rem admiralty arrest.

> Once it [is] determined that the in rem action is directed against a state itself and it seeks to have a federal court adjudicate the State's interest in the disputed property, a federal court need not reach the colorability of the State's claim, the action is barred by the Eleventh Amendment irrespective of the actual merit of the State's claim to the wreck and its treasures. (*Fitzgerald v. Unidentified WR & Abandoned Vessel* (1st Cir. 1989) 866 F.2d 16 at 18.)

In *Fitzgerald*, two groups of salvors filed admiralty actions in rem claiming exclusive title and possession to shipwreck off the coast of Puerto Rico. The Commonwealth intervened specially and moved to dismiss arguing that the action was barred by the Eleventh Amendment since it would necessarily require adjudication of the Commonwealth's interest in the wreck. The District Court ruled that the case was indistinguishable from the ruling in *Maritime Underwater Surveys, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel* (1st Cir. 1983) 717 F. 2d 6.

In *Maritime Underwater Surveys, Inc., supra*, the Attorney General of Massachusetts filed a restricted appearance for the purposes of asserting that the Eleventh Amendment barred federal adjudication of the State's claim to the vessel. Relying upon the U.S. Supreme Court decision in *Florida Department of State v. Treasure Salvors, Inc.* (1982) 458 U.S. 670, the First Circuit Court of Appeals, in *Fitzgerald*, noted that a majority of the justices in *Treasure Salvors, Inc.*, 458 U.S. at 702-03 [sic] (WHITE, J. concurring in part and dissenting in part), agreed on this point:

> The Court of Appeals [*in Treasure Salvors, Inc.*] thought that the jurisdictional issue raised by the State merged with a determination on the

merits of the validity of the State's claim to the property. The appellate court believed that it had "jurisdiction to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State. By holding that "[t]he court did not have power . . . to adjudicate the State's interest in the property without the State's consent." *ante*, at 682, the [plurality in *Treasure Salvors, Inc.*] properly rejects this novel conception of the Eleventh Amendment. The appellate courts's approach to the jurisdictional issue in not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. That approach is unsatisfactory because . . . it "is the equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." (*Fitzgerald, supra*, p. 18)

See also, *Jupier Wreck, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel* (S.D.Fla. 1988) 691 F.Supp. 1377. It is submitted by the State to this Court that the *Fitzgerald* Court has correctly stated the principle outlined by the Supreme Court in *Florida Department of State v. Treasure Salvors, Inc.*

When other Courts, such as the Ninth Circuit in *Marx v. Guam*, consider the issue of Eleventh Amendment immunity and speak of the "colorability" of a state's claim, what they are really addressing is the question of a state's "interrest", the adjudication of which would be an action (suit) against "one of the

United States", once that state "interest" is discerned, no further consideration need be made. The court lack [sic] jurisdiction.

The most recent and perhaps the best elucidation of this concept is expressed by the Seventh Circuit Court of Appeals, in *Zych v. SB Lady Elgin* (7th Cir. 1992) 960 F.2d 665. Harry Zych filed two in rem actions (*Zych v. SB Lady Elgin*, No 89 C 6501 and *Zych v. SB Seabird*, No 89 C 6502, (N.D. Ill. 1990) 746 F.Supp. 1344) claiming ownership of two abandoned shipwrecks discovered on the bed of Lake Michigan. The actions were originally consolidated, but took divergent legal paths when it was determined that the Lady Elgin had not been abandoned by the insurer. Illinois intervened claiming Eleventh Amendment immunity and was dismissed from the *Lady Elgin* suit. The District Court determined the ownership of the vessel to be in the Lady Elgin Foundation (Zych in another persona) and Zych petitioned the Court for an injunction to prevent all the world from interfering with his salvage efforts. Illinois appealed. After recounting the facts the Appeals Court directed its attention to the Illinois argument "that the strength of a state's legal arguments [claim] has nothing to do with its immunity under the Eleventh Amendment" It stated:

> To know whether a general all-the-world injunction runs against a state, the Court must determine whether the State has *some* interest. [emphasis by the Court] Michigan [for instance] has no conceivable interest in the remains of the *Lady Elgin*, so an all-claimants injunction could not be thought to invade Michigan's privileges in violation of the Eleventh Amendment. In this sense, some view of the merits is inevitable. *Marx v. Guam, supra*, on

> which [petitioner] relies, establishes no more than this. We hold that it is the existence, and not the strength of the claim that activates the Eleventh Amendment. No doubt that Illinois has a claim, which is the principal target of the District Judge's injunction." (*Zych v. Lady Elgin* (1992) 960 F.2d 665 at 670).

We respectfully submit that there is no doubt that California has an interest in the protection and preservation of the BROTHER JONATHAN, and that interest prevents this Court from exercising jurisdiction in this matter. Even if we consider the State's interest in this mater to be solely regulatory (the protection and preservation of historic shipwrecks on public trust lands), that regulatory interest is still sufficient to constitute this action, "a suit against the State", from which it is immune under the Eleventh Amendment.

Deep Sea's suit is a direct challenge to California's public trust responsibility to preserve and protect historic shipwrecks on public trust lands within its territorial waters. Plaintiff seeks by his admiralty complaint to circumvent the regulatory authority of the State. The Supreme Court has repeatedly stated that the Eleventh Amendment not only bars suits against the state when it is a named party, but when it is a party in fact. "Applicability [of the 11th Amendment] is to be determined by the essential nature and effect of the proceeding, as it appears from the entire record." See *Poindexter v. Greenhow* (1884) 114 U.S. 270, 5 S.Ct. 903; *Scheuer v. Rhodes* (1974) 416 U.S. 232, 94 S.Ct. 1683. The present action is barred by the State's Eleventh Amendment immunity and should be dismissed.

VIII. RULE 19(b)

In the event this Court grants Intervenor's motion to dismiss based on the State's Eleventh Amendment immunity, the Court should dismiss this case in its entirety. A ruling which determines Deep Sea's rights to the BROTHER JONATHAN, absent a consideration of the interest of the State, will produce an inconclusive result. Rule 19(b) of the Federal Rules of Civil Procedure directs that where an indispensable person can not be made a party and where an inconclusive result will occur in the persons absence, then the action should be completely dismissed. See *Marx v. Guam* (9th Cir. 1989) 866 F.2d at 301; *Fitzgerald v. Unidentified WR, & Abandoned Vessel,* (1st Cir. 1989) 866 F.2d at 18.

In *Zych* supra, the Court notes the State of Illinois claims to be an indispensable party. It also notes that while the First Circuit and the Ninth Circuit agree with Illinois' reasoning, its position as stated in *Seabird* (*Zych v. Seabird,* 941 F.2d 525 at 534 n.16) "settles the question for our circuit" by concluding that Illinois will not be prejudiced so long as the Federal Court judgment explicitly declares that it is not adjudicating the State's ownership rights. While that statement may address Illinois' immunity rights under the Eleventh Amendment it ignores the requirements of Rule 19(b).

In the closing sentence of the opinion, the Seventh Circuit Court of Appeals states: "The showdown between Zych and Illinois will occur in state rather than Federal Court". In making that statement the Court provides the best argument that can be made for a complete dismissal. Its judgment provided neither Zych nor Illinois with a remedy. To obtain a resolution, Illinois sued Zych in a State Court and the parties eventually entered a

stipulated settlement. (*State of Illinois v. Harry Zych*, No. 92 CH 8493, Cook County Circuit Court.) In our case, as in *Zych*, the only "interested" parties are the State and Deep Sea. This Court exercising the equity and good conscience required by Rule 19(b) must reasonably conclude that not only can it not adjudicate the State's interest, but it cannot fashion a remedy for the plaintiff. He is indeed left to his showdown in the State courts.

IX. CONCLUSION

The State of California respectfully submits that for the reasons cited herein, this action should be dismissed for lack of this Court's jurisdiction over the subject mater of this suit.

DATED: March 31, 1994

Respectfully,

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JAN S. STEVENS, Acting Assistant Attorney General
JOSEPH C. RUSCONI, Deputy Attorney General
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AFFIDAVIT OF GOODYEAR K. WALKER IN SUPPORT OF MOTION TO DISMISS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her Appurtenances, furniture, cargo, etc., Defendant.	No. C 91 3899 BAC AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS DATE: September 9, 1994 TIME: 10:00 a.m. JUDGE: Honorable Barbara A. Caulfield

STATE OF CALIFORNIA,)
STATE LANDS)
COMMISSION,)
)
Intervenor.)
)
UNITED STATES)
OF AMERICA,)
)
Intervenor.)

AFFIDAVIT OF GOODYEAR K. WALKER

I, GOODYEAR K. WALKER, declare:

1. I am employed by the California State Lands Commission as an Environmental Specialist IV. As part of my official duties I review applications for permits to salvage shipwrecks; specifically I prepare the necessary information for the Commission to make a determination of the environmental significance of the proposed activity under the California Environmental Quality Act (CEQA).

2. On September 2, 1988 I prepared a NOTICE OF INTENT TO ADOPT NEGATIVE DECLARATION, on the permit application of Sea Epics Research, Inc. for a permit to salvage cargo from the Steamship BROTHER JONATHAN. The notice and the supporting information is contained in a twenty two page document in the official files of the Commission and designated "file W 23867". In preparation of the report I reviewed documents and reports submitted by the Chief Executive Officer and Director of Research of Sea Epics Research, Donald G. Knight. Included within those documents was a one hundred and eleven page report entitled "Survey and Recovery Development Plan for the Brother Jonathan Project,

Crescent City California. The report is dated, December 1987, and lists as author Donald G. Knight.

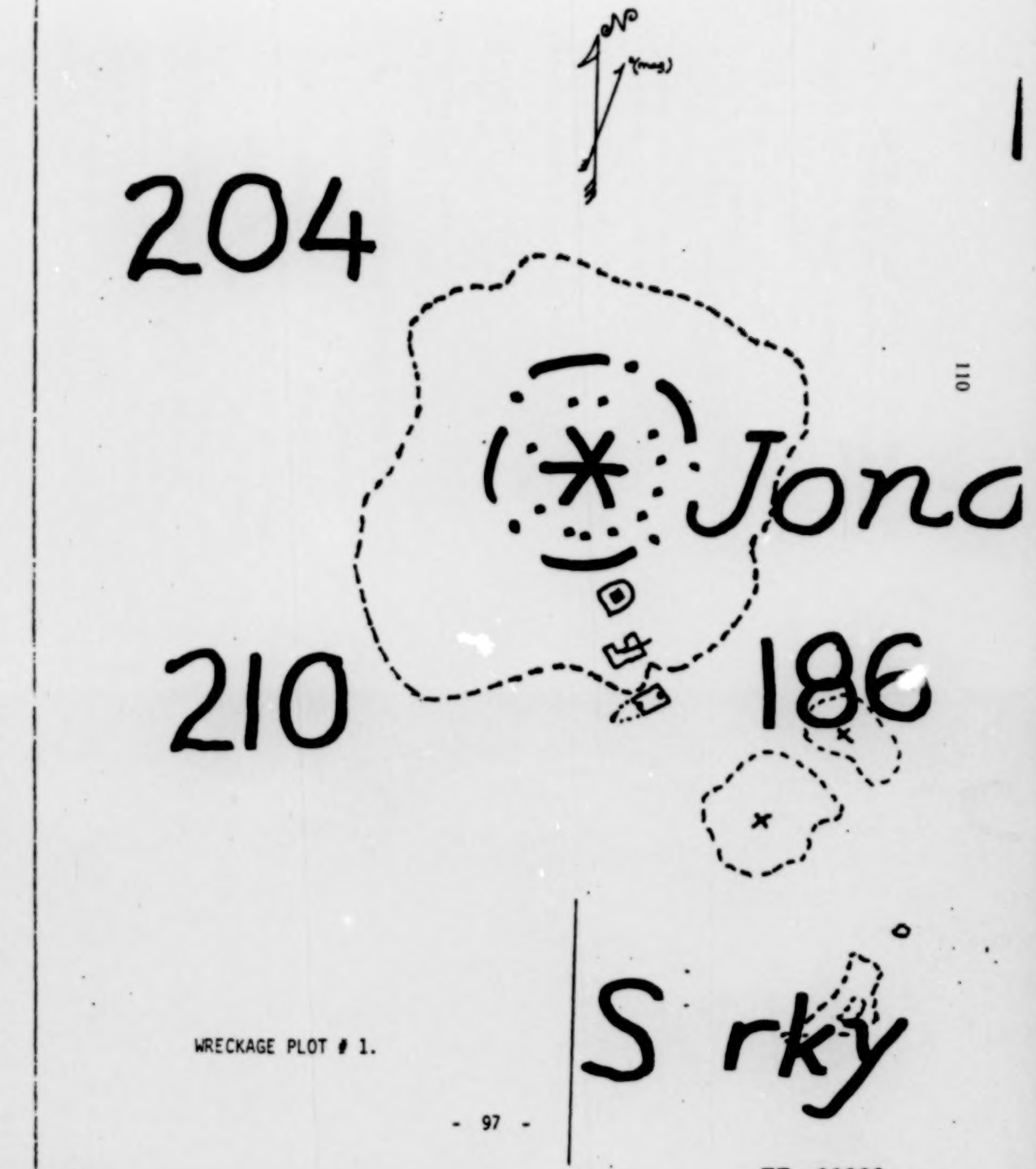
3. Section VIII of the report, the appendices, commencing on page 82, contains Area Charts, including NOAA Navigational Charts # 18600 and 18603 as well as NK 10 -7 (Minerals Management Service), Magnetometer Graphs, Side-Scan Sonar Graphs, Wreckage Plots, and Photographs and Diving Platform Profile. Wreckage Plot #1 (copy attached to this declaration as an exhibit) shows the location of the wreckage of the BROTHER JONATHAN in relationship to Jonathan Rock, a fixed visible physical feature. Based on this and other information, I determined the location of the BROTHER JONATHAN, which I included in the Commission's "Calwreck" computer inventory of California shipwrecks. That information was furnished to Counsel and to Roy F. Minnick.

4. As part of my continuing involvement with the processing of Sea Epics, Inc. application for a permit, I viewed a video film and side scan sonar imagery furnished and shown by Donald Knight represented by Mr. Knight to be of the BROTHER JONATHAN. Those images showed an underwater outline of Jonathan Rock and three portions of a vessel, partially embedded in the subsurface of the Ocean.

I declare under penalty of perjury that the foregoing is true and correct. If called as a witness, I could testify competently to the same.

Executed December 20 1991, at Sacramento, California.

/s/ Goodyear K. Walker
GOODYEAR K. WALKER



WRECKAGE PLOT # 1.

ER - 00083

EXHIBIT TO AFFIDAVIT OF GOODYEAR K. WALKER

AFFIDAVIT OF JOHN W. FOSTER IN SUPPORT OF MOTION TO DISMISS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her Appurtenances, furniture, cargo, etc., Defendant.	No. C 91 3899 BAC AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS DATE: September 9, 1994 TIME: 10:00 a.m. JUDGE: Honorable Barbara A. Caulfield

STATE OF CALIFORNIA, STATE LANDS COMMISSION,
Intervenor.

UNITED STATES OF AMERICA,
Intervenor.

AFFIDAVIT JOHN W. FOSTER

I, JOHN W. FOSTER, state:

1. I am a State Archaeologist III and the Supervisor of the Cultural Resources Program Unit, Resources Protection Division, California Department of Parks and Recreation. In that capacity I have supervision of the statewide cultural resources management activities of the Department as well as responsibility for establishment of standards and policies for conduct of archaeological and historical activities of the Department.

2. I have a M.A. Degree in Anthropology from California State University and a B.A. Degree in Anthropology from U.C.L.A. I have worked in the field of archaeology since 1966, taught anthropology at California State University, Long Beach and have been California's State Underwater Archaeologist since 1983. I have qualified and testified as an expert witness in Archaeology, in California Superior Court.

3. In my official capacity I have reviewed an application to the State Lands Commission of Sea Epics Research, Inc. for a permit to salvage portions of the BROTHER JONATHAN. As a part of that review I read

the "Archaeological Addendum" prepared by MACFARLANE ARCHAEOLOGICAL CONSULTANTS for the BROTHER JONATHAN Project. Additionally, I am familiar with the historic literature concerning the ship and the circumstances of her sinking.

4. I am also familiar with the criteria for determining historic significance and the eligibility of shipwrecks for National Historic Register status as set out in the National Register Bulletin Number 20 entitled, "Nominating Historic Vessels and Shipwrecks to the National Register of Historic Places" which is published by the National Park Service.

Based upon my knowledge of the BROTHER JONATHAN and the circumstance of her sinking as well as the criteria for National Register eligibility I am of the opinion that the BROTHER JONATHAN is eligible for National Register status.

I declare under penalty of perjury that the foregoing is true and correct. If called as a witness, I could testify competently to the same.

Executed on December 20 1991, at Sacramento, California.

/s/ John W. Foster
JOHN W. FOSTER

AFFIDAVIT OF BRYANT N. STURGESS IN SUPPORT OF MOTION TO DISMISS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant.	C 91 3899 BAC AFFIDAVIT OF BRYANT N. STURGESS IN SUPPORT OF RESPONSE TO PLAINTIFF'S OPPOSITION

STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor.	DATE: September 9, 1994 TIME: 10:00 a.m. JUDGE: Honorable Barbara A. Caulfield
UNITED STATES OF AMERICA, Intervenor.	

AFFIDAVIT OF BRYANT N. STURGESS

I, BRYANT N. STURGESS, declare:

I am a Registered Professional Civil Engineer (No. 29739) and a Licensed Land Surveyor (No LS 4333) in the State California. I have engaged in those professions in the State of California for thirty one years. I am currently employed as a Supervisor of the State Lands Commission's Boundary Officers in the Lakes, Rivers and North Coast Team. My duties in addition to supervision of other boundary determination officers, include directing and conducting research, field surveys, and mapping operations in connection with complex ownership, title, and boundary problems involving sovereign and other land under the jurisdiction of the State of California.

In connection with this litigation, I was requested by Counsel to review the Declaration of Mark L. Barnum and the information contained therein regarding the location of the *Brother Jonathan*. Using the figures provided, "1¾ miles south of the location described by the coordinates set forth in the declaration of Roy Minnick and depicted in the wreckage plot attached to Goodyears K.

Walker' declaration", I plotted locations using both statute miles and geographic miles (the Barnum declaration did not indicate which measurement was used) and determined that any position along a semi-circular arc 1¾ miles south of the coordinates was a location within the territorial sea of the State of California.

I also used the other location information provided by the Barnum declaration: "the wreck is at least 3¼ miles south of Southwest Seal Rock, and is approximately 4½ miles form [sic] the mean high tide line of the coast at Crescent City" to verify the location indicated by the declarant. That additional information confirms my findings, and that the location alleged in the declaration is within the State's territorial Sea. Other base points, including Whale Rock, Hump Rock and Star Rock, control the extent of the territorial sea in the area of the new location.

I declare under penalty of perjury that the foregoing is true and correct. If called as a witness, I could testify competently to the same.

Executed May 31, 1994, at Sacramento, California.

/s/ Bryant N. Sturgess
BRYANT N. STURGESS

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. The BROTHER JONATHAN, her Appurtenances, furniture, cargo, etc., Defendant.	C 91 3899 BAC REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS DATE: September 9, 1994 TIME: 10:00 a.m. JUDGE: Honorable Barbara A. Caulfield

STATE OF CALIFORNIA, STATE LANDS COMMISSION,
Intervenor.

UNITED STATES OF AMERICA,
Intervenor.

Intervenor, State of California, by way of special appearance hereby request that the court take judicial notice pursuant to Federal Rule of Evidence 201(b) of the following:

1. The fact that Southwest Seal Rock is located at Latitude 41 deg. 48' 50" N, Longitude 124 deg. 21' 5" W and is an island as defined by the United States Supreme Court in *U.S. v. California* (1947) 332 U.S. 19 and the Supplemental Decree (1966) 382 U.S. 448.

This fact is proved by the formula as stated by the United States Supreme Court in *U.S. v. California* as applied by Roy H. Minnick in his Affidavit filed in support of this motion.

2. The fact that a circle three geographic miles in radius with its center at Southwest Seal Rock encompasses the territorial waters of the State of California.

This fact is proved by the provisions of the Submerged Lands Act, 43 U.S.C. 1301, the case of *U.S. v. California* (1947) 332 U.S. 19 and the Supplemental Decree (1966) 382 U.S. 448, and by the Affidavit of Roy H. Minnick filed in support of this motion to dismiss.

3. The fact that the BROTHER JONATHAN is physically located within the three mile radius of Southwest Seal Rock and thus within the territorial waters of the State of California.

This fact is proved by the affidavits of Roy H. Minnick and Goodyear K. Walker in support of this motion to dismiss.

4. The fact that the BROTHER JONATHAN is "embedded" within the meaning of that term as defined in the Abandoned Shipwreck Act, 43 U.S.C. 2012(a).

This fact is proved by the Affidavit of Goodyear K. Walker filed in support of this motion to dismiss.

5. The fact that the BROTHER JONATHAN is eligible for inclusion in the National Register of Historic Places.

This fact is proved by the Affidavit of John W. Foster filed in support of this motion to dismiss.

All of the above facts are capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned.

DATED: March 31, 1994

Respectfully,

DANIEL E. LUNGREN, Attorney General of the State of California
JAN S. STEVENS, Acting Assistant Attorney General
JOSEPH C. RUSCONI, Deputy Attorney General
ROBERT C. HIGHT, Chief Counsel

PETER PELKOFER, Senior
Counsel
Attorneys for Intervenor
State of California,
State Lands Commission

/s/ Peter Pelkofer
PETER PELKOFER
1807 13th Street
Sacramento, CA 95814

NOTICE OF MOTION AND MOTION OF DEEP SEA RESEARCH FOR ISSUANCE OF A WARRANT FOR ARREST OF A CERTAIN WRECKED VESSEL

FLETCHER C. ALFORD, State Bar No. 152314
GORDON & REES
Embarcadero Center West
275 Battery Street, 20th Floor
San Francisco, California 94111
Telephone: (415) 986-5900

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, vs. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant. STATE OF CALIFORNIA, STATE LANDS COMMISSION, GOVERNMENT OF THE UNITED STATES OF AMERICA, Intervenors.	No. C 91 3899 BAC NOTICE OF MOTION AND MOTION OF PLAINTIFF DEEP SEA RESEARCH, INC. FOR ISSUANCE OF A WARRANT FOR ARREST OF A CERTAIN WRECKED VESSEL KNOWN AS THE BROTHER JONATHAN, HER CARGO AND APPURTENANCES, AND FOR AN ORDER APPOINTING PLAINTIFF EXCLUSIVE SALVOR OF THE SAME ACCOMPANYING PAPERS: MEMORANDUM OF POINTS AND

AUTHORITIES;
DECLARATION OF
DAVID L. FLOHR; and
PROPOSED ORDER

Date: September 9, 1994
Time: 10:00 a.m.
Judge: Honorable Barbara
A. Caulfield

(Filed Apr. 1, 1994)

PLEASE TAKE NOTICE that, on the date and time indicated above, a hearing will be held on the motion of plaintiff DEEP SEA RESEARCH, INC. for issuance of a warrant for arrest of a certain wrecked vessel known as *The Brother Jonathan*, her cargo and appurtenances, and for an order appointing plaintiff exclusive salvor of the same. The motion will be heard in courtroom G, at 450 Golden Gate Avenue, San Francisco, California.

The motion will be made pursuant to Supplemental Federal Rule of Civil Procedure C (3), and the general maritime law of the United States.

The motion is based upon this notice, the attached memorandum of points and authorities, the accompanying declaration of David L. Flohr, the plaintiff's complaint on file herein, and any other matters that may be presented at the hearing on the motion.

Dated: April 1, 1994 GORDON & REES

By: /s/ Fletcher C. Alford
Fletcher C. Alford

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

DECLARATION OF DAVID L. FLOHR IN SUPPORT OF REQUEST FOR WARRANT FOR ARREST OF VESSEL

FLETCHER C. ALFORD, State Bar #152314
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Telephone: (415) 986-5900

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC.,

Plaintiff,

v.

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,

Defendant.

STATE OF CALIFORNIA, STATE LANDS COMMISSION, GOVERNMENT OF THE UNITED STATES OF AMERICA,

Intervenors.

No. C 91 3899 BAC

DECLARATION OF DAVID L. FLOHR

ACCOMPANYING PAPERS:
NOTICE OF MOTION AND MOTION;
MEMORANDUM OF POINTS AND AUTHORITIES; and
PROPOSED ORDER

Date: September 9, 1994
Time: 10:00 a.m.
Judge: Honorable Barbara
A. Caulfield

I, DAVID L. FLOHR, declare:

1. I am an officer and director of plaintiff DEEP SEA RESEARCH, INC. ("DSR"), a California corporation.

2. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

3. Over the past 19 years the principals of DSR, and I personally, have undertaken extensive efforts to research the wreck of *The Brother Jonathan.* Those efforts have included reviewing newspaper articles and photographs from the 1860's, perusing government and insurance company archives, and reading the accounts of those who survived the wreck.

4. As a result of my research described above, I have obtained the following information regarding *The Brother Jonathan.* The vessel is a 220 foot long, wooden-hulled, side-wheeled steamer. On July 30, 1865, the vessel was enroute from San Francisco to Puget Sound with approximately 250 passengers and crew aboard when she encountered a fierce storm off the coast of Crescent City, apparently hit a rock or other obstacle, and sank. Based upon my review of the historical record, I believe that the vessel was carrying substantial quantities of gold coin and bullion when she sank.

5. In early October of 1993, DSR located what it believes to be the wreck of *The Brother Jonathan* resting on the ocean floor, while conducting a scanning sonar search of the ocean floor off the coast of Crescent City, from aboard the vessel *Buccaneer.* We confirmed the discovery by videotaping of the wreck site from two manned submersibles. Attached hereto as Exhibit "B" is

a true and correct copy of selected portions of the videotape taken of the wreck from cameras in the submersibles. The audio portion was added at a later time. The wreck was found resting on the ocean floor in several hundred feet of water, approximately 4½ miles off the coast of Crescent City.

6. We recovered several "token" artifacts from the wreck at that time, including: two pieces of china; a corked, full champagne bottle; a medicine bottle; an ale bottle; and a brass spike from the vessel's hull. Those artifacts have been sent to the International Artifact Conservation and Research Laboratory in Belle Chasse, Louisiana, where they are currently undergoing museum-quality restorative and preservative treatment. This process will cost DSR several hundred dollars per artifact. Attached hereto as Exhibit "C" is a true and correct copy of a letter from the Laboratory to DSR, accurately describing the artifacts and explaining the processes to which they are being subjected.

7. Attached hereto as Exhibit "A" is a true and correct copy of a newspaper article that appeared at pg. 1 of the *San Francisco Chronicle* on Friday, February 25, 1994. The article accurately describes the sinking of *The Brother Jonathan* and DSR's discovery of the wreck.

8. I and the other principals of DSR are active in the marine salvage community. Although others have searched for the wreck of *The Brother Jonathan*, I am informed and believe, through my association with the marine salvage community, that no one other than the principals of DSR have located and physically visited the wreck. Furthermore, our videotaping of the wreck site showed no evidence that it had been disturbed in any way by salvage activity.

9. None of the principals of DSR have any business, contractual, or other relationship with the original owners, crew, or insurers of *The Brother Jonathan* or her cargo, such as would impose upon them a contractual or other duty to salvage the wreck.

10. DSR has expended over $250,000 to date in searching for and locating the wreck of *The Brother Jonathan*. DSR stands ready, willing, and able to commence salvage operations on the wreck in the immediate future. Two of the principals of DSR have had extensive, successful underwater salvage experience, including U.S. Navy salvage operations and numerous commercial salvage recoveries, such as the recent recovery of an 18th century British merchant vessel on the East Coast. DSR has numerous investors with substantial net worth – including Mark Hemstreet, the owner of Shilo Inns Corporation – who have firmly pledged their financial support to the salvage operation, contingent only upon this Court's ruling in the above-captioned matter.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 1, 1994 /s/ David L. Flohr
DAVID L. FLOHR

EXHIBIT A

1865 Shipwreck Discovered Off North Coast

Legend says steamer sank with gold, booze, camels

By Carl Nolte
Chronicle Staff Writer

A team of underwater explorers using two midget submarines claimed yesterday to have discovered the wreckage of a paddle-wheel steamer that sank in a wild storm off the far Northern California coast 129 years ago.

It was the worst disaster in California maritime history – 221 people died on a Sunday afternoon, July 30, 1865, when the ship Brother Jonathan, bound from San Francisco to Victoria, B.C., hit an uncharted rock near Crescent City.

Only 19 people – 11 of them crew members – survived the wreck in a single lifeboat.

The captain is said to have complained that the ship was overloaded. Some say the Brother Jonathan carried $2 million in gold, a $250,000 payroll for the U.S. Army troops in the Northwest, 346 barrels of whiskey, two camels, a horse or all of the above.

"It is difficult to separate fact from fiction," said William Kooiman of the San Francisco Maritime National Historical Park.

The seas were so high and the storm was so fierce and the Brother Jonathan sank so quickly that no one was ever sure where the wreck was. Treasure hunters have been looking for the ship for more than 127 years.

But yesterday, Donald Knight, a 51-year-old archaeologist and deep-water explorer from Los Angeles

County, showed a video of the hulk and displayed artifacts at a radio station in Crescent City.

"It seems to be all in one piece and it's most definitely the Brother Jonathan," Knight said. "It is the culmination of a 19-year search," he said.

He described what his firm, Deep Sea Research Inc., had found as "historically and archaeologically extremely valuable."

Maritime Graveyard

"Also," he said, "we have found a maritime graveyard, the last resting place of 221 lives."

Knight's videotape showed that the ship is sitting upright on the ocean floor.

"You can see the hub of the paddle wheel on the port side, part of the steam boiler, part of the engine. It says 'Morgan Iron Works, New York,' " said Dwight Gregory, news director of radio station KPOD in Crescent City, who got a preview of the 19-minute tape.

Knight also produced some china plates, a spike from the hull and a medicine bottle that he said had come from the wreckage. But he would not say exactly where the Brother Jonathan lay on the sea bottom. "I'm not at liberty to disclose the location," he said.

One reason is that both California and the federal government claim ownership of old shipwrecks, which can contain very valuable historical artifacts.

Generally, treasure hunters discover more legal work than treasure in old wrecks, and both state and federal governments argue over possession. Government

bodies generally try to protect artifacts of historic interest, while exploring firms to recoup the costs of discovery by selling off recovered valuables.

A Piece of History

If Knight has actually discovered the wreck of the Brother Jonathan, it is a major find, "an interesting piece of history," said William Thomas, superintendent of the San Francisco Maritime National Historical Park.

The Brother Jonathan, built in New York in 1850, was one of several steamers that came to California by sailing around the tip of South America. The ship, which was 220 feet long and powered by a one-cylinder steam engine with an auxiliary set of sails, came to the Pacific in 1851.

By then, the vessel was already famous – "The Queen Elizabeth 2 of her day," Knight said – and made the regular run from Panama to San Francisco, the principal port for the gold fields.

Later, the ship was assigned to coastwide service from San Diego to Canada. There were no railroads and the roads were impassable in those days, so big steamers such as the Brother Jonathan were the main travel links.

The ship sailed from San Francisco bound north on July 28. Staterooms cost $75 apiece first class, the food was said to be fit "for the palate of a king."

The ship called at Albion, Little River and Mendocino on the North Coast, and at Crescent City just south of the Oregon boarder, on July 29. Later, townspeople said they had noticed that the ship appeared overloaded and riding deep in the water. The ship sailed Sunday morning, the 30th. By noon, a stiff wind, called

"a blue nor'wester" by locals, blew up, and there were huge seas. The ship could not make headway, so Captain Samuel De Wolf put the helm up and headed back for Crescent City. After an hour, the ship hit a submerged and uncharted rock in the vicinity of St. George Reef, filled with water and sank.

Only one of the six lifeboats got away. As it cleared the ship, the skipper shouted, "Tell them if they had not overloaded us . . . this would never have happened."

Among the casualties were Army General George Wright, Anson Henry, who had been appointed governor of the Washington Territory, and James Nesbit, editor of the San Francisco Bulletin.

Letter Washes Ashore

Nesbit spent his last hours in the salon, writing. His body washed ashore later, and in the pocket of his coat, wrapped in oilskins, was a farewell letter to his wife and children.

Attempts to find the wreckage began in 1867 and featured old Indian legends, stories about gold bullion, casks of whiskey and other treasures. In the 1930s, a fisherman hauled up 22 pounds of gold bars, minted in 1865, but he kept the exact location a secret to his dying day.

There was a big stir in 1970 when a group called itself the Brother Jonathan Co. thought it had found the wreck. "But we were on the wrong trail," John Fraser, one of the company's founders, said yesterday. "I'm glad as hell somebody else found it."

221 people died when the Brother Jonathan went down, the worst maritime disaster in state history

SHIPWRECK: Brother Jonathan Discovered

CHRONICLE GRAPHIC

DECLARATION OF DON SIVERTS IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant. _____/ STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor. _____/	No. C 91 3899 BAC DECLARATION OF DON SIVERTS IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS ACCOMPANYING PAPERS: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID L. FLOHR; DECLARATION OF RICHARD SLATER; DECLARATION OF MARK L. BARNUM; DECLARATION OF ARNOLD JACKSON; DECLARATION OF DOUGLAS GROOM; and PROPOSED ORDER

GOVERNMENT OF THE UNITED STATES OF AMERICA,

Intervenor.

Date: September 9, 1994
Time: 10:00 a.m.
Judge: Honorable Barbara A. Caulfield

I, DON SIVERTS, declare:

1. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

2. I am the President and Chief Executive Officer of Undersea Graphics, Inc. ("UGI"). UGI is in the business of conducting underwater surveying and videotaping from its 1-man submersible craft known as *The Snooper*. UGI's work includes surveying underwater geological formations, conducting biological population counts of various ocean life, environmental work, inspecting man-made underwater structures, and performing pre-salvage surveying and videotaping of wrecked and sunken vessels. I have been doing this type of work for more than 35 years.

3. In the fall of 1993, UGI was hired by DEEP SEA RESEARCH, INC. ("DSR") to assist in locating, surveying, and filming the wreck of *The Brother Jonathan* by the use of *The Snooper* submersible.

4. Prior to commencing underwater operations, Mr. Donald Knight showed me certain side-scan sonar imagery and video footage that had been taken from an unmanned submersible in 1987 on behalf of Mr. Knight's former corporation, Sea Epics, Inc. ~~The~~ sonar imagery and video footage depicted Jonathan Rock and the immediately adjacent area – i.e., the same area that is shown in the "Wreckage Plot #1" attached to the Affidavit of

Goodyear K. Walker submitted with the State of California's Motion to Dismiss, and which is described by the coordinates set forth in the Declaration of Roy H. Minnick also attached to the State's motion. I am informed and believe that this sonar imagery and video footage was submitted by Sea Epics, Inc. to the State Lands Commission as part of its application for a permit to salvage *The Brother Jonathan*. I could not determine from the sonar imagery and the video footage whether the objects depicted therein were man-made, or whether they were simply naturally occurring rock formations.

5. In late September and early October of 1993, I piloted *The Snooper* submersible in the waters off the coast of Crescent City in an attempt to locate, survey, and videotape *The Brother Jonathan* for DSR. I began the search in the area adjacent to Jonathan Rock depicted by the sonar imagery and video footage referenced in the preceding paragraph of this declaration – i.e., the same area that is depicted in the "Wreckage Plot #1" attached as an exhibit to Goodyear K. Walker's affidavit, and described by the coordinates set forth in the Declaration of Roy H. Minnick. I surveyed and videotaped that area extensively over the course of several days, using *The Snooper* submersible. *I did not find any sign of The Brother Jonathan or any other shipwreck anywhere close to that area.* However, I did see certain rock formations that were consistent with the images displayed on the video footage and sonar imagery that Mr. Knight had shown me.

6. I continued my search using *The Snooper* submersible, and together with *The Delta* submersible operated by Delta Oceanographics, we eventually discovered *The Brother Jonathan* in early October of 1993. I took a videotape of the wreck at that time. The videotape,

which was attached as Exhibit "B" to DSR's Motion For Issuance of A Warrant For Arrest, etc., filed with this Court, accurately depicts the wreck of *The Brother Jonathan* as I observed it. I understand that a voice soundtrack was subsequently added to the videotape. I do not know who added the voice soundtrack, and I cannot attest to the accuracy of any comments made therein.

7. The wreck is located approximately 4½ miles from the mean high tide line of the coast of Crescent City. The wreck is approximately 1¾ miles south of Jonathan Rock, and at least 3¼ miles south of Southwest Seal Rock. It is in 250 feet of water.

8. Based upon my observations of *The Brother Jonathan*, I believe the wreck is resting atop the ocean floor, and is not buried in or firmly affixed to the ocean floor. At least three-quarters of the hull, and all of the surviving superstructure, floors, galley, cabins and other portions of the vessel are clearly visible above the surface of the ocean floor, as depicted in the videotape attached as Exhibit "B" to DSR's motion. The boilers, steam pipes, drive shaft, paddle-wheel hubs, and other portions of the drive mechanism are also clearly visible above the surface of the ocean floor, as depicted in the videotape. Also clearly visible above the surface are the dining china, barrels, steel rails, and other cargo, all stacked rather neatly atop the ocean floor. Although the lower portions of the hull are not visible in the videotape, based upon my personal observations of the wreck I do not believe the lower portions of the hull are buried in the ocean floor; rather, the lower portions of the hull appear to have deteriorated and collapsed, and are resting atop the ocean floor.

9. I saw down into the hull, and the interior of the vessel did not appear to contain any significant amount of sand, mud, or dirt.

10. Certain limited portions of the vessel, particularly in the aft, were covered by a layer of sediment during the time that I observed it. But this sediment is no more than an inch or two deep at most, and it is extremely fine, loose, powdery, and easily disturbed. It could easily be wiped away with the human hand, without the need for any excavation tools. Based upon my knowledge of oceanographic conditions in that area, I believe the sediment is not static, and it could easily be displaced completely from the vessel in any one of the storms or strong currents that are common to that area.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 20, 1994 /s/ Donald C. Siverts
DON SIVERTS

DECLARATION OF DAVID L. FLOHR IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

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Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant. STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor.	No. C 91 3899 BAC DECLARATION OF DAVID L. FLOHR IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS ACCOMPANYING PAPERS: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DON SIVERTS; DECLARATION OF RICHARD SLATER; DECLARATION OF MARK L. BARNUM; DECLARATION OF ARNOLD JACKSON; DECLARATION OF DOUGLAS GROOM; and PROPOSED ORDER

GOVERNMENT OF THE UNITED STATES OF AMERICA, Intervenor.	Date: Time: Judge:	September 9, 1994 10:00 a.m. Honorable Barbara A. Caulfield

I, DAVID L. FLOHR, declare:

1. I am an officer and director of plaintiff DEEP SEA RESEARCH, INC. ("DSR"), a California corporation.

2. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

3. For the last 1½ years I have been attempting to locate the insurers that paid claims for loss of *The Brother Jonathan* and its cargo. I have examined historical records from the San Francisco City Directory at the Mechanics Institute Library in San Francisco, the San Francisco public library, and various newspapers. I have also made numerous inquiries of Lloyds of London Insurance Company, the New York State Insurance Department, the California Insurance Department, the California State Archives, and the National Archives.

4. According to my research, the following insurance entities paid claims for loss of *The Brother Jonathan* or its cargo:

1. *California Insurance Company* (paid $20,000 in 1865 dollars);

2. *California Lloyds* (paid $13,000 in 1865 dollars);

3. *Merchants' Mutual* (paid $10,000 in 1865 dollars);

4. *Bigelow & Brother* (paid $2,500 in 1865 dollars);

5. *Falkner, Bell & Co.* (paid $2,500 in 1865 dollars).

See New York Times newspaper article attached hereto as Exhibit "A".

5. Through my research, I have learned that California Insurance Company's assets were purchased by Commercial Union Insurance Company in 1965. DSR has acquired all of Commercial Union's right, title, and interest in *The Brother Jonathan. See* Agreement Relating To Assignment of Title To A Certain Shipwreck, etc., a true and correct copy of which is attached hereto as Exhibit "B".

6. I have been unable to locate or confirm the continuing existence of California Lloyds, Merchants' Mutual, or Falkner, Bell & Co.

7. Bigelow & Brother was an insurance company operating in San Francisco in 1865. Attached hereto as Exhibit "C" is a copy of its advertisement from the 1865 San Francisco Directory. It is no longer in existence. Its marine department issued insurance through three different underwriters: Home Insurance Company of New York, Security Insurance Company of New York, and Phoenix Insurance Company of New York. I have been unable to locate or confirm the continuing existence of Security Insurance Company of New York or Phoenix Insurance Company of New York. I have located Home Insurance Company of New York, and am currently negotiating with that insurance company on behalf of

DSR to obtain an agreement under which it would assign to DSR all right, title, and interest in *The Brother Jonathan.*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 2, 1994 /s/ David L Flohr
DAVID L. FLOHR

EXHIBIT A

THE NEW YORK TIMES.

NEW-YORK, SATURDAY, AUGUST 26, 1865.

ANOTHER GREAT DISASTER.

Wreck of the Steamship Brother Jonathan.

She is Lost on the Voyage from San Francisco to Oregon.

She Strikes on a Sunken Rock and Sinks in an Hour.

Reported Loss of Nearly One Hundred and Fifty Lives.

ONLY SIXTEEN PERSONS KNOWN TO BE SAVED.

The interruption of telegraphic communication with the Pacific coast during the last few weeks may account for the fact that we have not received any intimation of the fearful calamity recorded below. These particulars we find in the San Francisco Steamer *Bulletin* of Aug. 3. That paper says:

"The brief telegram in the morning papers, announcing the wreck of the steamer *Brother Jonathan*, and the loss of nearly all on board, cast a gloom over the community and created the most intense anxiety among those of our citizens having relations or friends on board. The meagre and unsatisfactory character of the dispatch, while it increased the public anxiety, at the same time, from its entire lack of details, afforded grounds for hope that the general fact may have been exaggerated, and that the loss of life will not turn out to be so great as reported. Unless there was a very heavy sea at the scene of disaster, it seems hardly possible that only 16 persons out of 162 passengers and crew, should have been saved – especially as the wreck is reported to have occurred at 2 o'clock in the afternoon, and the passengers had an hour in which to save themselves after being notified of the danger. It is also remarkable that a courier should have been dispatched from Camp Lincoln to Jacksonville, whence the dispatch was sent to Col. DRUM, stating that sixteen passengers only were saved, and at the same time omitting to mention any of their names.

The *Brother Jonathan* was provided with three large surf-boats and three of FRANCIS' patent life-boats, so that it is not improbable that more of the passengers have been saved than we know of now. The coast in the vicinity of the accident is exceedingly rocky, and the feat of landing in a boat a dangerous one at any time. It is not unlikely that one or more boats from the steamer might

have put off from the shore with the hope of reaching Crescent City, which is only about ten miles distant, in which case we should not have received tidings from them as soon as from the others who landed in the vicinity of the wreck.

Jacksonville is but sixty miles from the scene of the wreck, and the public will probably have to wait till another courier is dispatched from Cape Lincoln before they will learn any further particulars. We have been unable, up to the time of going to press, to get any additional telegrams from Jacksonville relating to the calamity. The official dispatch to Col. DRUM, on which the morning telegram was based, arrived late last evening, and is as follows:

CAMP LINCOLN, VIA JACKSONVILLE, Oregon,
July 31, 1865. – Received at San Francisco, }
Aug. 1, 1865, at 10 P. M.

To Col. R. C. Drum:

At 3 P. M. yesterday, the steamer *Brother Jonathan* struck a sunken rock, and sunk in less than an hour, with all on board, except 16 persons, who escaped in a small boat, the only survivors of the ill-fated ship. No trace of the vessel is left. I was out last night on the beach with 14 men; shall keep a party out on the beach. Gen. WRIGHT, family and staff are supposed to be lost. Full particulars by mail.

THOMAS BUCKLEY,
Captain Sixth Infantry, O. V., Commanding.

As will be seen by the above telegram the disaster occurred on Sunday afternoon.

Camp Lincoln is situated about six miles from Crescent City, and four miles from the coast, where the wreck occurred.

The *Brother Jonathan* left San Francisco on Friday morning last, at 10 o'clock, bound for Portland, Oregon, and thence to Victoria, Vancouver's Island. She is one of the California Steam Navigation Company's regular steamers, plying between these points, and was built, or rebuilt, in this city two years since. She was considered a staunch boat. Her crew, including officers, consisted of 54 men. The number of passengers on board, including children, was 109; at least this is the number registered at the company's office in this city, but it usually happens that several passengers go on board at the last moment, and their names are not registered at the office. The following is a complete list of the passengers and crew so far as known:

PASSENGERS.

Brig. Gen. Wright, U. S. A., and wife, Lieut. E. D. Waite, U. S. A., Miss Mary Berry, S. Meyer, David McHardle, A. L. Styles and wife, Wm. Logan and servant, James Nisbet, James E. Trites, M. Crawford, T. Dawson, Miss Mary Place, Mrs. Stackpole, infant and child, J. Weil, Mrs. Annie Craig, Mrs. Lee and infant, Gov. A. C. Henry, L. G. Tuttle, B. H. Stone, wife and infant, Capt. Chaddock, U. S. R. S., Mrs. John C. Keenan and 7 ladies, S. N. Luckey, wife and child, Miss Forbes, A. A. Stone, wife and infant, Charles H. Belden, Albert Micklet, Geo. Wedeckind, Jos. Berton, Thomas Moyle and wife, Robert M. Frazer, John R. Craig, William Billiniski, J. S. Binn, Mrs. Woodlock, Conrad Adams, Frederick A. Pound, Gilman Clindman, James Lynch, G.

Carrell, Moses Bertier, P. Leffer, A. Ingraham, M. D., U. S. A., James R. Richards, Miss E. P. Snow, James Connell, J. G. Gay and wife, Miss N. Shirser, M. L. Hefron, George W. Pollack, Charles C. Northrop, J. C. Hunsacker, Mrs. N. C. Brooks, Miss Hemsley, Wm. Logan and wife, D. Crandall, Victor Smith, Mrs. C. Fountain, daughter and child, D. C. Rowell wife and 4 children, Mrs. J. Stanford, Mrs. Jane Church, (colored,) Mrs. Wendell and child, (colored,) J. S. Geddes, B. Mathewson, Mrs. Luckey and 2 children; Maj. E. W. Eddy, U. S. A., Jos. Orselli, H. Defirnie, S. B. Morgan, Geo. W. Annis, J. B. Strong, S. P. Craig, Mary A. Tweedle, Patrick Dwyer, John Adams, two Indians, R. S. Manly, Henry Abrams, Thomas Guilan, C. Bisner, and Wells, Fargo & Co.'s Express Messenger.

CREW OF THE "BROTHER JONATHAN."

S. J. DeWolfe, Commander; W. A. H. Allen, 1st officer; J. D. Campbell, 2d officer; James Patterson, 3d officer; John S. Benton, purser; Albert Dyer, freight clerk; Elijah Mott, chief engineer; G. White, 1st assistant engineer; J. Francis, 2d assistant engineer; Wm. Anderson, oiler; Patrick Lynn, fireman; A. Collenburg, fireman; Frederick Malers, fireman; Arthur Harvey, fireman; William Lowery, fireman; John Gorman, coal-passer; John Hilton, coal-passer; John Clinton, coal-passer; James Perkins, seaman; Jacob Yates, seaman; Joseph L. Gomez, seaman; Henry Walker, seaman; J. Thompson, fireman; G. Frederick, seaman; A. Gonzels, seaman; William Penn, seaman; L. Domingo, seaman; J. Silva, seaman; William Foster, seaman; Frederick S. Douglas, seaman; James Fowler, seaman; D. Deas, 2d pantryman; Thomas Tierney, porter; Henry Miller, baker; Edward Shields, waiter; Charles Rice, waiter; Manuel Herrlia,

waiter; C. F. Laurend, watchman; Richard Daulton, steward; H. G. Brown, 2d steward; John Miller, pantryman; Chas. Laws, cook; James Laws, 2d cook; Henry Lee, 3d cook; C. Stevenson, stewardress [sic]; John T. Hutton, cabin boy; Armand Lee, cabin boy; Edward Franklin, cabin boy; Lewis Johnson, cabin boy; John E. Poster, cabin boy; Mateo Salinas, cabin boy; David Farrell, cabin boy; Stephen Moran, cabin boy; John W. Welch, cabin boy.

The *Brother Jonathan* carried a valuable cargo, on which there were insurances in San Francisco offices as follows:

California Insurance Company	$20,000
California Lloyds	13,690
Merchants' Mutual	10,000
Bigelow Bros.	2,600
Falkner, Bell & Co.	2,300
Total	$48,490

Probably two-thirds of the cargo was uninsured.

BRIEF NOTICES OF SOME OF THE PASSENGERS.

Brig.-Gen. WRIGHT entered the military service in 1822. He served with distinction in Florida, and subsequently in the Mexican war, where he led the assaulting column in the battle of Molino del Rey – one, of the most gallant feats of the war. At the close of the Mexican war he was detailed to the Pacific coast, where he has served most of the time since commanding at different times the districts of Oregon, Lower California, and the Department of the Pacific. He was en route to Fort Vancouver to take command of the Department of the Columbia, to which he was lately assigned.

Lieut. E. D. WAITE was Aid-de-Camp to Gen. WRIGHT. He entered the service in 1861.

Maj. EDDY was additional Paymaster in the army, and entered the service in 1861. At his particular request he was allowed to change off with Maj. FAY, who was first designated for the post.

Gov. A. G. HENRY was formerly United States Surveyor-General, and had recently been appointed Governor of Washington Territory. He was a dear friend of the Lincoln family, and it was in his house that Mr. LINCOLN married his wife. He was about 55 years of age, and a man of noble character.

VICTOR SMITH was formerly Collector of Customs at Puget Sound. He had but recently returned from the Eastern States, and was on the ill-fated steamship *Golden Rule* in charge of a large amount of government funds when she was wrecked on the reefs about a month ago.

Capt. CHADDUCK came to this country in 1849, in the *Lawrence*, and has been in service on this coast ever since. For several years past he has been in command of the revenue cutter *Joe Lane*.

Dr. A. INGRAM is a surgeon in the regular army, and was attached to the Second United States Dragoons in the Army of the Potomac. He was in every battle of that grand army up to the fight at Gettysburgh, about which time he was ordered to this coast, and has recently been transferred to the Department of Oregon.

JAMES R. RICHARDS, of the firm of RICHARDS & MCCRACKEN, and J. S. GEDDES, well-known Front-street merchants, were among the passengers.

Among the passengers was JAMES NIBBET, one of the editors of this paper, who was on his way to Oregon and British Columbia to spend three or four weeks of relaxation from the laborious duties of his profession. Mr. NEBBIT has been connected with the *Bulletin* since 1855, and is well known to the community. We still indulge the hope that he, with many others, will yet be found among the saved, and refrain, therefore, from any obituary notice at this time.

Capt. DE WOLFE, who commanded the *Brother Jonathan*, has been running on this coast for about fifteen years past. At the time Capt. STAPLES was killed in Portland, DE WOLFE was his mate, and upon his death succeeded Capt. STAPLES to the command of the *Brother Jonathan*, which position he has held ever since. He is about 40 years of age, and has a wife residing in this city. Capt. DE WOLFE was one of two or three persons who were saved from the steamboat *Lexington* which was burned in Long Island Sound, in the Winter of 1840. He floated ashore on a bale of cotton."

EXHIBIT B

AGREEMENT RELATING TO ASSIGNMENT OF TITLE TO A CERTAIN SHIPWRECK KNOWN AS THE BROTHER JONATHAN, HER CARGO AND APPURTENANCES

I. DECLARATIONS

1. WHEREAS Deep Sea Research, Inc., a California Corporation (hereinafter "SDR"), has, through its own efforts, discovered and taken constructive possession of a certain shipwrecked vessel currently resting on the ocean floor off the Northern California Coast, known as "The Brother Jonathan", her cargo and appurtenances (hereinafter collectively "VESSEL"), and;

2. WHEREAS commercial Union Insurance Company and Home Insurance Company of New York (hereafter collectively "IDENTIFIED INSURERS") issued insurance policies (hereinafter "POLICIES") to the owner or owners of the VESSEL, insuring said VESSEL, or portions thereof against loss or damage, and;

3. WHEREAS the POLICIES were in full force and effect when the VESSEL was wrecked and lost on the afternoon of July 30, 1865, and;

4. WHEREAS IDENTIFIED INSURERS paid claims to their insureds for loss of the VESSEL pursuant to the POLICIES, and took title to the VESSEL, or portions thereof, by operation of law under the principles of subrogation, and;

5. WHEREAS IDENTIFIED INSURERS have retained their title to the VESSEL as of the date of their signing of this Agreement, without abandoning or relinquishing said title, and;

6. WHEREAS DSR stands ready, willing, and able to salvage the VESSEL, or portions thereof, if, and when, all legal obstacles to the salvage operation are resolved,

The parties to this Agreement hereby covenant as follows:

II. COVENANTS

7. IDENTIFIED INSURERS hereby assign, convey, and transfer all their right, title, and interest in the VESSEL to DSR.

8. Within 60 days after salvage of the VESSEL and appropriate preservation of all recovered items has been completed, DSR shall render an accounting to IDENTIFIED INSURERS of all recovered items, including a description of each recovered item and an appraisal of its market value. The appraisal shall be conducted by a qualified appraiser who is mutually agreeable to DSR and IDENTIFIED INSURERS. In the event DSR and IDENTIFIED INSURERS are unable to select a mutually agreeable appraiser, each shall select an appraiser and the two appraisers so selected shall select a third appraiser, who will alone perform the appraisal.

9. Within 60 days after the completion of the accounting and appraisal described in the previous paragraph, DSR shall pay to the IDENTIFIED INSURERS a sum of money and/or treasure trove

and other valuables equal to ten (10) percent of the net value (net value to mean the value of the salved property after deducting all reasonable expenses attributable to the salvage operation) of the items recovered from the VESSEL as total consideration to be shared among the IDENTIFIED INSURERS, the share of each corresponding directly to the proportion that its payment of claims for loss of the VESSEL bears to the total payments made by the IDENTIFIED INSURERS. Thus, for example, an IDENTIFIED INSURER that paid a claim or claims for loss of the VESSEL amounting to ninety (90) percent of the total claims paid by all IDENTIFIED INSURERS for the loss of the VESSEL would receive a ninety (90) percent share of the total amount of the money, treasure trove, or artifacts to which the IDENTIFIED INSURERS are collectively entitled under this paragraph.

10. All attorneys' fees, costs, or other expenses of any kind or nature arising from or in any way connected with any dispute among or between the IDENTIFIED INSURERS relating to the division of money, treasure trove, or other valuables as provided for in the preceding paragraph shall be borne solely by IDENTIFIED INSURERS, and shall not be the responsibility of DSR. IDENTIFIED INSURERS agree to indemnify and hold harmless DSR from and against any and all attorneys' fees, costs, or other expenses of any kind or nature arising from or in any way connected therewith.

11. DSR shall have sole control over salvage of the VESSEL, and shall exercise its own complete and unfettered discretion with respect to the salvage methods and means employed. IDENTIFIED

INSURERS shall have no control over the salvage operation, and shall not be deemed to be partners, managers, joint venturers, employers, employees, agents, or servants of, for, or with one another or DSR.

12. Except as provided in paragraph 10 above, IDENTIFIED INSURERS shall not be responsible for any liabilities, losses, costs, expenses, or attorneys fees arising from or in any way connected with salvage of the VESSEL. Except as provided in paragraph 10 above, DSR shall indemnify and hold harmless IDENTIFIED INSURERS from and against any and all liabilities, losses, costs, expenses, or attorneys fees arising from or in any way connected with salvage of the VESSEL.

13. DSR shall keep records showing all costs and expenses incurred by it in the discovery of the VESSEL, salvage of the VESSEL, and appropriate preservation of all items recovered from the VESSEL. Said records shall be kept in conformance with standard accounting practices, and shall be available for inspection by IDENTIFIED INSURERS at any time, upon reasonable notice. DSR shall retain such records until one year after the distribution of money, treasure trove, or other valuables as provided for in paragraph 9 above.

14. IDENTIFIED INSURERS understand that other persons or entities in addition to IDENTIFIED INSURERS may have issued insurance policies to the owner or owners of the VESSEL, insuring the VESSEL, or portions thereof, against loss or damage. IDENTIFIED INSURERS understand that any such persons or entities hereafter discovered, identified, or located may, at the sole discretion of

DSR, hereafter become parties and signatories to this Agreement, in which event they shall share in all rights and liabilities of IDENTIFIED INSURERS provided for in this Agreement, including, but not limited to, sharing in the 10 (ten) percent of the net value of the items recovered from the VESSEL, as set forth in paragraph 9 above. IDENTIFIED INSURERS understand and agree that the 10 (ten) percent of the net value of the items recovered from the VESSEL shall be shared collectively among all insurers of the VESSEL as provided in paragraph 9 above, whether now known or hereafter discovered, identified, or located, and that in the event other insurers hereafter become parties to this Agreement and are added as IDENTIFIED INSURERS hereunder, the current IDENTIFIED INSURERS shall not be entitled to any additional compensation or consideration from DSR by virtue thereof.

15. Within three (3) business days after signing this Agreement, each IDENTIFIED INSURER shall commence employing its best efforts to locate, and submit to DSR, documents establishing or evidencing its payment of claims for loss of the VESSEL. IDENTIFIED INSURERS understand and agree that time is of the essence, and that the failure of any IDENTIFIED INSURER to comply with the provisions of this paragraph shall be deemed a material breach of this Agreement.

16. The persons whose signatures are affixed below represent and warrant that they have been duly authorized to sign this Agreement on behalf of the parties they purport to represent.

ALL-PURPOSE ACKNOWLEDGMENT

NO 259

State of California
County of Riverside

On 4-20-94 (DATE) before me, Laura M. Gardner (NAME, TITLE OF OFFICER - E.G. "JANE DOE, NOTARY PUBLIC")

personally appeared SHERMAN HARRIS (NAME(S) OF SIGNER(S))

☒ personally known to me - OR - ☐ ~~proved to me on the basis of satisfactory evidence~~ to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(ies) and that by his/~~her/their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

Laura M. Gardner
SIGNATURE OF NOTARY

LAURA M. GARDNER
COMM. #965488
NOTARY PUBLIC - CALIFORNIA
RIVERSIDE COUNTY
My Commission Exp. Apr. 29, 1996

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
- ☒ CORPORATE OFFICER(S) President (TITLE(S))
- ☐ PARTNER(S)
- ☐ ATTORNEY-IN-FACT
- ☐ TRUSTEE(S)
- ☐ SUBSCRIBING WITNESS
- ☐ GUARDIAN/CONSERVATOR
- ☐ OTHER: _____

SIGNER IS REPRESENTING:
(NAME OF PERSON(S) OR ENTITY(IES))
DEEP SEA RESEARCH, INC.

ATTENTION NOTARY: Although the information requested below is OPTIONAL, it could prevent fraudulent attachment of this certificate to unauthorized document.

THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED AT RIGHT:

Title or Type of Document _____
Number of Pages _____ Date of Document _____
Signer(s) Other Than Named Above _____

ER - 00102

COMMONWEALTH OF MASSACHUSETTS

County of Suffolk, ss Date: 4-6-94

On the 6th day of April, in the year 1994 before me personally came Arthur T. Sigmonds, Jr. to me known, and known to me to be the person described in, and who executed the foregoing instrument, and acknowledged to me that he executed same.

/s/ Martin B. Cohen
MARTIN B. COHEN,
Notary Public
My commission expires:
Jun. 18, 1999

INSURE ACAINST ACCIDENTS.

The National Life

—AND—

TRAVELERS' INSURANCE CO.,

NEW YORK.

CAPITAL - - - - - - - - - - - $500,000.

EDWARD A. JOYNE, President. W. B. FRENCH, Vice President.
ASHER S. MILLS, Secretary. T. B. VAN BUREN, Treasurer.

FRANCIS SCHULTZE, General Agent for California.

Issue Policies insuring against accidents of all kinds, whether they occur at home or while traveling—in the cars, on the boat, in the shop, in the street, while attending to business, or while on a pleasure trip—the payment of a small premium will secure the full amount of the Policy to the family of the insured in case of DEATH BY ACCIDENT. And in case of injury, causing disability, the insured receives a weekly compensation until he is able to attend to his business, such time not to exceed six months. The Policy covers all forms of disconnections, broken bones, sprains, bruises, cuts, gun-shot wounds, burns and scalds, bites of dogs, assaults by burglars, robbers, or murderers, the effects of lightning or sun-stroke, the effects of explosions, drugs, and suffocation by drowning or choking, and all other kinds of accidents.

Twenty-five Dollars against a General Accident Policy for FIVE THOUSAND DOLLARS, with a weekly compensation of TWENTY-FIVE DOLLARS.

MARINE RISKS AND SPECIAL VOYAGES.

Policies are granted insuring against death by accident while sailing in steamers or sailing vessels; also for special voyages. No medical examination required. Policies issued at once.

Travelers' Insurance Tickets for any length of time, from one day to twelve months, are on sale at the various Railroad, Stage, and Steamboat Ticket Offices and Agencies.

LIFE AND ENDOWMENT POLICIES

Are issued on the Mutual plan. All the profits in this department are divided pro rata among the Policy holders. All Policies on the Accumulative order five years from date, and non-forfeitable after two annual payments. A loan of one-third the amount of premiums will be made; also, thirty days' grace given in the payment of premiums.

In insuring against accidents No Medical Examination is required. All ages are accepted, and the premiums are so small that a man, be he merchant, merchant, or professional man, may insure a Policy.

NO POLICY FEE CHARGED.

Full information, with tables of rates, can be obtained at the office.

FRANCIS SCHULTZE, Agent,

Office, Northeast Corner Battery and Clay Streets,

SAN FRANCISCO.

DAVID HENRIQUES,

MEMBER OF THE

"SAN FRANCISCO STOCK AND EXCHANGE BOARD,"

STOCKS and REAL ESTATE

Bought and Sold on Commission.

LOANS NEGOTIATED.

OFFICE:

612 Merchant Street, between Montgomery and Kearny,

SAN FRANCISCO.

General Insurance Agency,

BIGELOW & BROTHER,

North-West corner Montgomery and Sacramento Streets.

FIRE; MARINE; LIFE

—AND—

ACCIDENTAL

INSURANCE.

We would respectfully call the attention of property owners to the increased facilities for Insurance, which we are now prepared to offer, surpassing any agency in the world.

MARINE DEPARTMENT.

Aggregate Capital, - - - $7,000,000.

HOME INSURANCE COMPANY, of New York, assets.....$4,000,000
SECURITY INSURANCE COMPANY, of New York, assets.....$2,000,000
PHENIX INSURANCE COMPANY, of New York, assets.....$1,000,000

War Risks and partial loss covered on the most favorable terms. Liberal rebates paid parties bringing business to this office. All Losses paid in gold coin without any deduction.

FIRE DEPARTMENT.

HOME INSURANCE CO., N. Y.	WASHINGTON INSURANCE CO., N. Y.
PHENIX INSURANCE CO., N. Y.	SECURITY INSURANCE CO., N. Y.
ARCTIC INSURANCE CO., N. Y.	HARTFORD FIRE INS. CO., Hartford.

Aggregate Assets. . . . . $10,000,000.

LIFE INSURANCE.

Connecticut Mutual Life Insurance, of Hartford, assets nearly . . . $3,000,000
Equitable Life Assurance Society, of United States, assets $1,000,000

ACCIDENT INSURANCE.

New York Accident Insurance Company, Capital $250,000

In the Fire Department, we issue participation policies on all hazardous and not hazardous property, entitling insured to 60 per cent. in the profits of the Company, thereby lessening their premiums at least 30 per cent.

In the Life Department, the Companies we represent are the best and cheapest in the world. Blanks descriptive of the various plans issued gratis to the public. No charge for physicians' examinations.

Agents in all the principal towns on this coast.

BIGELOW & BROTHER,
General Agents,
North-West corner Montgomery and Sacramento Streets.

Exhibit

ER - 00104

BEST AVAILABLE COPY

DECLARATION OF RICHARD SLATER IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

FLETCHER C. ALFORD, #152314
GORDON & REES
Embarcadero Center West
275 Battery Street, 20th Floor
San Francisco, California 94111
Telephone: (415) 986-5900

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC.,

Plaintiff,

v.

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,

Defendant.

STATE OF CALIFORNIA, STATE LANDS COMMISSION,

Intervenor.

No. C 91 3899 BAC

DECLARATION OF RICHARD SLATER IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

ACCOMPANYING PAPERS: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID L. FLOHR; DECLARATION OF DON SIVERTS; DECLARATION OF MARK L. BARNUM; DECLARATION OF ARNOLD JACKSON; DECLARATION OF DOUGLAS GROOM; and PROPOSED ORDER

GOVERNMENT OF THE UNITED STATES OF AMERICA,

Intervenor.

Date: September 9, 1994
Time: 10:00 a.m.
Judge: Honorable Barbara A. Caulfield

I, RICHARD SLATER, declare:

1. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

2. I am a general partner of Delta Oceanographics Company.

3. I have been involved in underwater surveying work for more than 30 years, including substantial work surveying and videotaping shipwrecks in pre-salvage operations.

4. I have a Ph.D. degree in geology.

5. I have reviewed the videotape of *The Brother Jonathan* wreck, a copy of which was submitted as Exhibit "B" to the motion of DEEP SEA RESEARCH, INC. filed with this Court. Based upon my review of the videotape, I believe that all intact portions of the vessel's hull would be accessible without the use of excavation tools. There is only a thin veneer of silt over portions of the wreck. This silt is very fine and soft, and could easily be blown off in a typical storm common to that area.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 21, 1994

/s/ Richard Slater
RICHARD SLATER

DECLARATION OF MARK L. BARNUM IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

FLETCHER C. ALFORD, #152314
GORDON & REES
Embarcadero Center West
275 Battery Street, 20th Floor
San Francisco, California 94111
Telephone: (415) 986-5900

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC.,

Plaintiff,

v.

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,

Defendant.

STATE OF CALIFORNIA, STATE LANDS COMMISSION,

Intervenor.

No. C 91 3899 BAC

DECLARATION OF MARK L. BARNUM IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

ACCOMPANYING PAPERS: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID L. FLOHR; DECLARATION OF DON SIVERTS; DECLARATION OF ARNOLD JACKSON; DECLARATION OF DOUGLAS GROOM; and PROPOSED ORDER

GOVERNMENT OF THE UNITED STATES OF AMERICA,

Intervenor.

Date: September 9, 1994
Time: 10:00 a.m.
Judge: Honorable Barbara A. Caulfield

I, Mark L. Barnum, declare:

1. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

2. I am the sole proprietor of Applied Technology and Research Company ("ATAR"). ATAR is in the business of precision offshore navigation, high resolution offshore surveying, positioning, and mapping.

3. Attached to this declaration is a true and correct copy of my resume.

4. I was retained by DEEP SEA RESEARCH, INC. ("DSR") to conduct the navigation and positioning work aboard the ship *M/V Cavalier* during DSR's excursion in search of the wreck of *The Brother Jonathan* off the coast of Crescent City in late-September and early-October of 1993. The submersibles *Delta* and *The Snooper* were also working from the *Cavalier.*

5. I was aboard the *Cavalier* at the time *The Brother Jonathan* was discovered, and I charted the location of the wreck using a Trimble G.P.S. Global Positioning System Device. This device receives global positioning data simultaneously from 12 satellites and feeds that data through a computer program, which converts the data into the location of the device in latitude

and longitude. The device can also calculate your distance and direction from any other selected point of reference. Its margin of error is less than 50 meters.

6. I have reviewed the affidavit of Roy H. Minnick submitted to this Court in support of the State of California's motion to dismiss, and am familiar with the coordinates set forth on page 3 of the affidavit. I have also reviewed the declaration of Goodyear K. Walker submitted to this Court in support of the State of California's motion to dismiss, as well as the "Wreckage Plat #1" attached as an exhibit to that declaration. The wreckage plot is simply an exploded portion of National Oceanic and Atmospheric Administration map 18603, depicting the area in the immediate vicinity of Jonathan Rock, off the coast of Crescent City – which is the same area described by the coordinates set forth at page 3 of the affidavit of Roy H. Minnick. The *Cavalier* and its accompanying submersibles searched that area extensively during late-September of 1993, but found no wreckage there. We found the wreck of *The Brother Jonathan* several days later, approximately 1¾ miles south of the location described by the coordinates set forth in the declaration of Roy Minnick and depicted in the wreckage plot attached to Goodyear K. Walker's declaration. The wreck is at least 3¼ miles south of Southwest Seal Rock, and is approximately 4½ miles from the mean high tide line of the coast of Crescent City.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 20, 1994

/s/ Mark L. Barnum
MARK L. BARNUM

DECLARATION OF ARNOLD JACKSON IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

FLETCHER C. ALFORD, #152314
GORDON & REES
Embarcadero Center West
275 Battery Street, 20th Floor
San Francisco, California 94111
Telephone: (415) 986-5900

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant.	No. C 91 3899 BAC DECLARATION OF ARNOLD JACKSON IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS ACCOMPANYING PAPERS: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID L. FLOHR; DECLARATION OF DON SIVERTS; DECLARATION OF RICHARD SLATER; DECLARATION OF MARK L. BARNUM; DECLARATION OF DOUGLAS GROOM; and PROPOSED ORDER
STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor.	

GOVERNMENT OF THE UNITED STATES OF AMERICA, Intervenor.	Date: September 9, 1994 Time: 10:00 a.m. Judge: Honorable Barbara A. Caulfield

I, ARNOLD JACKSON, declare:

1. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

2. I am the principal and chief executive officer of American Underwater Lighting, Inc. and its subsidiary, American Underwater Vehicles Company. These companies manufacture state-of-the-art diving propulsion vehicles, underwater diving lights, and other diving equipment.

3. I have been active in the diving community for more than 15 years. I am certified as a diving instructor by the Professional Association of Diving Instructors, the International Diving Educators' Association, the International Association of Nitrox Divers, and the National Association of Cave Divers. I am also a member of the board of directors of the latter organization. I conduct diving instruction classes and seminars on state-of-the-art diving equipment throughout the United States.

4. Five years ago, a diver could not work a shipwreck 250 feet deep without taking a very significant risk of danger to his life and health. One of the greatest elements of this risk is a condition known as "the bends." The bends occurs when nitrogen that is normally dissolved in the blood separates from the blood and turns

into its gaseous form. The condition can be life threatening. The deeper the dive, the greater the danger the diver will contract the bends. Until recently, the condition and its means of prevention have not been well understood. However, there have been very dramatic advancements in the scientific understanding of the bends in the last several years, and equally dramatic improvements in diving equipment and technology – greatly reducing the risk of the bends and making deep water diving much safer. These advancements include:

A. *Mixed Gasses.* Approximately one year ago, diving expert Sheck Exely published a set of diving tables which significantly increase the safety of deep water diving and reduce the danger of contracting the bends. These tables call for the diver to use special gas mixtures, the precise combination of which will vary depending on the depth of the dive. For instance, the tables advise a diver diving to 250 feet to switch from compressed air to a mixture of helium, oxygen, and nitrogen at a specified depth during the descent. This mixture of gasses greatly decreases the risk that the diver will contract the bends. Prior to the publication of these tables, reliable and accurate information was not available to assist the deep water diver in determining the proper mixture of gasses to use in order to prevent the bends.

B. *Better Dive Propulsion Vehicles.* A dive propulsion vehicle is a motorized device that pulls the diver through the water. A dive propulsion vehicle is essential in order to work a shipwreck at 250 feet. Without it, the diver would be required to expend much more physical exertion, and the consequent fatigue would interfere with the diver's ability to work the

wreck and would leave him more vulnerable to contracting the bends. Until last year, there were no dependable dive propulsion vehicles that were capable of functioning reliably and safely at 250 feet.

C. *Nitrox.* Nitrox is oxygen-enriched air that is used for decompression during deep water dives. It allows the diver to work underwater longer, and return to the surface faster than would otherwise be possible if the diver were breathing normal air. Nitrox has been available to the diving community for less than three years. I was one of the very first diving instructors certified to teach the use of nitrox in diving, and my certification was not completed until November 1991.

D. *Better Dry Suits.* The protective clothing worn by deep water divers is known as a "dry suit." There have been significant advances in dry suit technology in the last several years. These include the use of argon gas-filled suits, and thermostatically-controlled suit heaters. These advances allow the diver to stay warmer and more comfortable, reducing the risk of the bends and allowing the diver to stay down longer.

5. Cumulatively, these advancements have made it reasonably safe for a diver to work a wreck today at 250 feet.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 7, 1994

/s/ Arnold Jackson, Jr.
ARNOLD JACKSON

DECLARATION OF DOUGLAS GROOM IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

FLETCHER C. ALFORD, #152314
GORDON & REES
Embarcadero Center West
275 Battery Street, 20th Floor
San Francisco, California 94111
Telephone: (415) 986-5900

Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant. STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor.	No. C 91 3899 BAC DECLARATION OF DOUGLAS GROOM IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS ACCOMPANYING PAPERS: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID L. FLOHR; DECLARATION OF DON SIVERTS; DECLARATION OF RICHARD SLATER; DECLARATION OF MARK L. BARNUM; DECLARATION OF ARNOLD JACKSON; and PROPOSED ORDER

GOVERNMENT OF THE UNITED STATES OF AMERICA, Intervenor.	Date: September 9, 1994 Time: 10:00 a.m. Judge: Honorable Barbara A. Caulfield

I, DOUGLAS GROOM, declare:

1. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

2. I am the manager of the Off-Shore Products Division of Western Marine Electronics, Inc. ("WESMAR"). This division manufactures and sells sonar equipment for off-shore salvage and diving operations.

3. I have an associate of arts degree in electronics, a bachelor of arts degree in Zoology, and a master of business administration with a specialty in computer information systems.

4. Among other things, WESMAR manufactures and sells side scan sonar devices. Side scan sonars are currently the best available devices for locating shipwrecks and other underwater objects. Side scan sonars have been on the market for approximately 20 years. The sonar technology in use prior to that time was not sufficiently sophisticated to locate a shipwreck in 250 feet of water.

5. Although side scan sonar devices have been on the market for approximately 20 years, until 2 to 3 years ago a side scan sonar device capable of locating a shipwreck in 250 feet of water would cost $80-100 thousand.

Such devices are now available for less than $20 thousand. Furthermore, with the advent of improved microprocessing and video display technology in the last several years, the side scan sonar devices that are currently available on the market are capable of locating shipwrecks in 250 feet of water that likely would have gone unlocated 5 years ago.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 2 May, 1994

/s/ Douglas Groom
DOUGLAS GROOM

DECLARATION OF WILLARD BASCOM IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

FLETCHER C. ALFORD, #152314
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Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant. / STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor. /	No. C 91 3899 BAC DECLARATION OF WILLARD BASCOM IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS ACCOMPANYING PAPERS: SUPPLEMENTAL DECLARATION OF DAVID FLOHR

GOVERNMENT OF THE UNITED STATES OF AMERICA,

Intervenor.

Date: Sept. 9, 1994
Time: 10:00 a.m.
Judge: Honorable Barbara A. Caulfield

I, Willard Bascom, declare:

1. I have personal knowledge of the mattes stated in this declaration, and could competently testify to them if called as a witness.

2. I was a Licensed Professional Engineer.

3. I have extensive experience in oceanography, underwater salvage, and marine archaeology.

4. For more than 45 years I have conducted and supervised oceanographic and marine engineering studies for numerous institutions, including the University of California at Berkeley, Scripps Institution of Oceanography, the National Academy of Sciences, and the Southern California Coastal Water Research Project. I have also taught oceanography, marine engineering, and marine archaeology for various institutions, including the Scripps Institution of Oceanography, the University of California at San Diego, and the California State University at Long Beach.

5. I have authored numerous books, papers, and articles in professional journals on the topics of oceanography, marine engineering, and marine archaeology. A complete listing of those publications is contained in my curriculum vitae, a true and correct copy of which is attached hereto as Exhibit "A".

6. I have served on numerous professional committees, including the Naval Research Advisory Committee, the National Sea Grant College Panel of the National Oceanic and Atmospheric Administration, the U.S. Army Corps of Engineers Coastal Engineering Research Board, the National Academy of Sciences Ocean Science Board, and the National Academy of Engineering Committee on Ocean Engineering.

7. I have designed and overseen the construction of numerous ships specially designed for undersea mining, mineral exploration, seismic work, oceanographic research, and marine archaeological work.

8. I have developed and patented several inventions that are now widely used in deep water mining, marine salvage and recovery, and undersea drilling.

9. I have recently conducted approximately 15 expeditions to Turkey, searching for and locating ancient shipwrecks and other marine archaeological finds off the Turkish coast.

10. I am currently conducting an expedition to Greece to locate an ancient Greek shipwreck that is known to contain priceless Greek statues. This expedition is being sponsored by the University of California, the San Diego Art Museum, and the Rolex Watch Company.

11. I have viewed extensive video footage of the wreck of *The Brother Jonathan* supplied to me by David Flohr. It is my opinion, after viewing that video footage, that *The Brother Jonathan* is not embedded in the ocean floor. The wreck is not firmly affixed in the ocean floor, and one would not be required to use excavating tools to move any bottom sediments in order to gain access to the wreck or its cargo.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 15, 1994

/s/ Willard Bascom
WILLARD BASCOM

SUPPLEMENTAL DECLARATION OF DAVID FLOHR IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

FLETCHER C. ALFORD, #152314
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Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC.,

Plaintiff,

v.

THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc.,

Defendant.

STATE OF CALIFORNIA, STATE LANDS COMMISSION,

Intervenor.

No. C 91 3899 BAC

SUPPLEMENTAL DECLARATION OF DAVID FLOHR IN OPPOSITION TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS

ACCOMPANYING PAPERS:
DECLARATION OF WILLARD BASCOM

GOVERNMENT OF THE UNITED STATES OF AMERICA,

Intervenor.

Date: Sept. 9, 1994
Time: 10:00 a.m.
Judge: Honorable Barbara A. Caulfield

I, David Flohr, declare:

1. I am the treasurer of plaintiff DEEP SEA RESEARCH, INC.

2. I have personal knowledge of the matters stated in this declaration, and could competently testify to them if called as a witness.

3. I have personally viewed the wreck of *The Brother Jonathan* from a submersible craft.

4. I provided to Willard Bascom the video footage of the wreck of *The Brother Jonathan* referred to in his declaration. That video footage is a true and accurate depiction of the wreck of *The Brother Jonathan.*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 15, 1994

/s/ David Flohr
DAVID FLOHR

REPORTER'S TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE LOUIS C. BECHTLE ON SEPTEMBER 9, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
LOUIS C. BECHTLE, JUDGE

DEEP SEA RESEARCH, INC.,

PLAINTIFF,

VS.

THE BROTHER JONATHAN, HER APPURTENANCES, FURNITURE, CARGO, ETC.,

DEFENDANT.

NO. C 91-3899 LCB

STATE OF CALIFORNIA, STATE LANDS COMMISSION,

INTERVENOR.

UNITED STATES OF AMERICA,

INTERVENOR.

SAN FRANCISCO, CALIFORNIA
FRIDAY, SEPTEMBER 9, 1994

FOR PLAINTIFF: GORDON & REES
275 BATTERY STREET,
20TH FLOOR
EMBARCADERO CENTER WEST
SAN FRANCISCO, CALIFORNIA
94111

BY: FLETCHER C. ALFORD, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE:)

REPORTED BY: JAMES J. YEOMANS, CSR
OFFICIAL COURT REPORTER, USDC

COMPUTERIZED TRANSCRIPTION
BY XSCRIBE

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BY: JOSEPH C. RUSCONI, ESQ.
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GENERAL

1807 13TH STREET
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93814

BY: PETER PELKOFER, ESQ.
SENIOR COUNSEL

[p. 3] FRIDAY, SEPTEMBER 9, 1994 9:30 A.M.

THE COURT: DEEP SEA RESEARCH, INC. VERSUS THE BROTHER JONATHAN. WE'RE DOWN TO THAT.

COUNSEL.

MR. RUSCONE [sic]: JOSEPH RUSCONI FOR THE STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA.

MR. PELKOFER: PETER PELKOFER SENIOR COUNSEL FOR THE CALIFORNIA STATE LANDS COMMISSION.

MS. O'MALLEY: BARBARA O'MALLEY FOR THE UNITED STATES OF AMERICA.

MR. ALFORD: GOOD MORNING.

FLETCHER ALFORD FOR PLAINTIFF DEEP SEA RESEARCH, INC.

THE COURT: ALL RIGHT. THANKS FOR WAITING A FEW MINUTES HERE.

THE ORDER OF BUSINESS BEFORE THE COURT HAS TO DO WITH THE – I GUESS, THE MOTION BEFORE THE COURT IS THAT WHERE WE'RE GOING. HERE'S WHAT I'D LIKE TO DO:

I'D LIKE EACH COUNSEL TO, JUST SO OUR TRANSCRIPT WILL BE USEFUL TO WHOEVER

READS IT, IF YOU'D JUST MAKE A BRIEF THREE MINUTE OR SO SUMMARY OF THE ISSUE BEFORE THE COURT TODAY FROM YOUR VANTAGE POINT.

MOVING PARTY FIRST, I SUPPOSE.

MR. RUSCONI: WE HAVE TWO MOVING PARTIES.

THE COURT: LET'S BEGIN – I DON'T CARE WHICH, LET'S [p. 4] HEAR FROM EITHER PARTY.

MR. PELKOFER: THANK YOU, YOUR HONOR.

PETER PELKOFER AGAIN, SENIOR COUNSEL STATE LANDS COMMISSION.

BEFORE I ACTUALLY DO THAT LITTLE SUMMARY, YOUR HONOR, I'D LIKE TO INDICATE FOR THE RECORD, WE ARE APPEARING ESPECIALLY FOR THE LIMITED PURPOSE OF CHALLENGING THE JURISDICTION OF THE COURT IN THIS MATTER.

THAT HAS BEEN MADE CLEAR IN OUR PLEADINGS THROUGHOUT, AND I UNDERSTOOD FROM THE CLERK THAT WE MIGHT WANT TO GET INTO SOME EVIDENTIARY MATTERS, AND WE'RE PERFECTLY WILLING TO PARTICIPATE IN THAT TYPE OF EXCHANGE, WITH THE UNDERSTANDING THAT WE'RE RESERVING OUR 11TH AMENDMENT IMMUNITY.

THE COURT: I DON'T THINK THERE'S ANY MOTION HERE THAT, COURT HEARS ANY EVIDENCE THAT YOU'RE WAIVING, BY NOT STANDING EVERY THREE MINUTES AND SAYING

SOMETHING, THAT'S YOUR POSITION. AND UNTIL THAT ISSUE IS ULTIMATELY DECIDED, I'M SURE THAT WILL CONTINUE TO BE YOUR POSITION, EVEN IF YOU PARTICIPATE IN OTHER FEATURES.

MR. PELKOFER: I JUST WANTED TO MAKE THAT CLEAR FOR THE RECORD BECAUSE I'M CONCERNED ABOUT THAT. THE STATE IS MOVING TO DISMISS THIS MATTER, YOUR HONOR, FOR WHAT WE BELIEVE IS WANT OF JURISDICTION ON THE PART OF THE COURT, AND WE HAVE A NUMBER OF BASES FOR THAT POSITION.

ONE OF THEM BEING, THAT THIS ACTION IS A SUIT AGAINST [p. 5] THE STATE OF CALIFORNIA, AND AS SUCH THE STATE HAS IMMUNITY UNDER THE 11TH AMENDMENT.

WE BASE THAT ON THE FACT THAT THE SUBJECT MATTER OF THE SUIT, THAT IS THE BROTHER JONATHAN, IS AN ABANDONED SHIPWRECK. IT RESTS IN THE TERRITORIAL WATERS OF THE STATE OF CALIFORNIA, AND THAT THE STATE HAS AN INTEREST, AN INTEREST CAPABLE OF BEING PROTECTED UNDER THE 11TH AMENDMENT. THAT INTEREST BEING BOTH A POSSESSORY INTEREST AND WHAT I WOULD CHOSE [sic] TO CALL A REGULATORY OR PUBLIC TRUST INTEREST.

THE OTHER BASIS FOR OUR REQUEST FOR DISMISSAL IS THE ABANDONED SHIPWRECK ACT PASSED BY CONGRESS IN 1988, WHICH BASICALLY SAYS SHIPWRECKS ABANDONED WITHIN THE JURISDICTIONAL WATERS OF THE

STATE, IF THEY'RE STANDING NATURE OR EMBEDDED BECOME THE PROPERTY OF THE STATE AND THE STATE SHOULD CARE FOR THEM AS CULTURAL RESOURCES. THAT BASICALLY IS OUR CASE, YOUR HONOR.

THE COURT: ALL RIGHT. FINE. THAT'S A BRIEF SUMMARY, THAT'S WHAT I WAS INTERESTED IN.

YES.

MR. ALFORD: YOUR HONOR, FLETCHER ALFRED FOR PLAINTIFF DEEP SEA RESEARCH.

THE PLAINTIFF BRINGS THIS IN REM ADMIRALTY ACTION AGAINST A SUNKEN VESSEL. THE STATE WAS NOT NAMED AS A PARTY, THIS IS A TRUE IN REM ACTION AGAINST A VESSEL TO PERFECT A MARITIME LIEN.

[p. 6] ARTICLE 3, SECTION 2 OF THE UNITED STATES CONSTITUTION CONFERS ON THIS COURT EXCLUSIVE JURISDICTION TO HEAR ADMIRALTY MATTERS REGARDING MARITIME LIENS. THE CASE LAW IS VERY CLEAR ON THAT POINT. AND OUR GOAL IN BRINGING THIS ACTION IS TO PERFECT OUR MARITIME LIEN UNDER THE LAWS OF SALVAGE AND FINDS. THOSE ARE BOTH ANCIENT PRINCIPLES THAT ARE WELL ESTABLISHED IN THE FEDERAL RULE OF ADMIRALTY.

TO BRIEFLY EXPLAIN, SALVAGE IS THE PRINCIPLE THAT IF A VESSEL IN DISTRESS IS FOUND ON THE HIGH SEAS, DERELICT VESSEL, AND SOMEONE RENDERS AID TO IT, THEN THEY HAVE

A LIEN FOR COMPENSATION FOR THEIR SERVICES. AND THE IMPORTANT PRINCIPLE THERE IS TO ENCOURAGE PEOPLE TO RECOVER DERELICT PROPERTY FROM THE HIGH SEAS.

SORT OF A COMPANION PRINCIPLE IS LAW OF FINDS, WHICH AGAIN IS AN ANCIENT, WELL ESTABLISHED PRINCIPLE, THAT PROVIDES ESSENTIALLY FINDERS KEEPERS. PROPERTY ABANDONED ON THE HIGH SEAS AND YOU FIND IT, THEN IT'S YOURS.

AND THE WAY THAT YOU PERFECT YOUR TITLE OR YOUR LIEN ON THE PROPERTY IS BY BRINGING AN IN REM ACTION IN FEDERAL COURT, AND THAT'S PRETTY CLEAR, IT'S ESTABLISHED BY FEDERAL SUPPLEMENTAL RULE OF CIVIL PROCEDURE C, WHICH PROVIDES SPECIFIC PROCEDURES BY WHICH THE SALVOR OR THE FINDER CAN PERFECT A MARITIME LIEN AGAINST A VESSEL.

THE COURT: YOU SEEK A COURT ORDER DESIGNATING THIS SHIP AS YOUR PROPERTY BASED UPON THAT ADMIRALTY RULE?

[p. 7] MR. ALFORD: EXACTLY. THERE'S ALSO ANOTHER IMPORTANT CONSIDERATION, THAT WHEN THE VESSEL WAS ORIGINALLY LOST INSURANCE COMPANIES PAID CLAIMS FOR LOSS OF THE VESSEL, AND AS A MATTER OF LAW, BY OPERATION OF LAW THEY BECAME THE OWNERS OF THE VESSEL BY PRINCIPLES OF SUBROGATION AND THEY HAVE ASSIGNED THEIR TITLE TO US.

SO NOW WE ARE THE OWNERS OF THE VESSEL AND THE STATE AND THE FEDERAL GOVERNMENTS INTERVENED IN THIS ACTION CLAIMING THAT – CLAIMING THAT THE STATE HAD TITLE TO THE VESSEL UNDER THE ABANDONED SHIPWRECK ACT. THERE ARE SEVERAL FACTUAL PREDICATES IN ORDER FOR THE ABANDONED SHIPWRECK ACT TO APPLY?

ONE, OBVIOUSLY THE SHIPWRECK MUST BE ABANDONED. IT'S HERE – NOT HERE EVEN UNDER THE FEDERAL GOVERNMENT'S OWN GUIDELINES, WHICH PROVIDE IF AN INSURANCE COMPANY DID PAY CLAIMS ON THE VESSEL, THEN THAT INSURANCE COMPANY HAS TITLE BY SUBROGATION AND THE VESSEL IS NOT ABANDONED. SO CLEARLY IT'S NOT ABANDONED HERE.

AND THE OTHER ELEMENT IS THAT THE VESSEL MUST BE EITHER EMBEDDED OR DETERMINED BY THE SECRETARY OF THE INTERIOR TO BE ELIGIBLE FOR LISTING IN THE NATIONAL REGISTER OR HISTORIC PLACES.

THERE'S BEEN ABSOLUTELY NO SHOWING HERE THE VESSEL HAS BEEN DETERMINED, AFTER PUBLIC HEARING, WHICH IS WHAT THE STATUTE REQUIRES, DETERMINED AFTER PUBLIC HEARING, AFTER SECRETARY OF THE INTERIOR TO GO ELIGIBLE FOR LISTING ON THE [p. 8] NATIONAL REGISTER.

SO THE ONLY OTHER WAY THEY CAN CLAIM ENTITLEMENT TO THE VESSEL IF IT IS EMBEDDED. WE HAVE SUBMITTED DECLARATIONS

FROM A MARINE GEOLOGIST, MARINE ARCHEOLOGIST AND A SALVAGE EXPERT WHO UNIFORMLY SAY WE'VE SEEN THE VESSEL, IT'S NOT EMBEDDED.

THE COURT: I UNDERSTAND THAT.

MR. ALFORD: THAT ESSENTIALLY EVOLVES INTO THE 11TH AMENDMENT ISSUE, DOES THE STATE HAVE AN INTEREST IN THE VESSEL? AND WE SAY THEY DO NOT BECAUSE THE ABANDONED SHIPWRECK ACT SIMPLY DOES NOT APPLY.

THE STATE SEEMS TO BE ASSERTING THAT ALL IT HAS TO DO IS MAKE A BALD ASSERTION OF OWNERSHIP OF THE PROPERTY, IT AUTOMATICALLY – THAT DIVESTS THE COURT OF JURISDICTION. OF COURSE, THE COURT HAS JURISDICTION TO DETERMINE ITS JURISDICTION, AND IN ORDER TO DETERMINE ITS JURISDICTION HAS TO DETERMINE WHETHER THE STATE HAS TITLE TO THE PROPERTY.

THE COURT: THANK YOU.

MR. ALFORD: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

MS. O'MALLEY: YOUR HONOR, I'M HERE FOR MORE LIMITED PURPOSE, IT'S TO DEFEND THE CONSTITUTIONALITY OF THE ABANDONED SHIPWRECK ACT SHOULD IT BECOME AN ISSUE IN THIS PROCEEDING. UP UNTIL NOW I THINK WE ALL KNOW THERE IS A DISPUTE ABOUT WHETHER OR NOT THAT ACT ACTUALLY APPLIES.

[p. 9] BECAUSE OF THE EVIDENTIARY ISSUE OF WHERE THE SHIPWRECK IS LOCATED AND ALSO BECAUSE THE STATE IS BASING ITS CLAIM, AS I UNDERSTAND IT, ON MORE THAN THE ABANDONED SHIPWRECK ACT, THE STATE OF CALIFORNIA HAS ITS OWN STATUTE, ITS OWN PERMIT SYSTEM THAT HAS EXISTED FOR MANY YEARS.

PRIOR TO THE ENACTMENT OF THE ABANDONED SHIPWRECK ACT AND UNDER THAT STATUTE AND THE STATE'S REGULATORY INTEREST IN REGULATING EVEN SHIPWRECKS FOR, ASSUMING ARGUENDO, THEY USE THAT PHRASE, IT DOES BELONG TO THE SALVOR THROUGH THE INSURANCE COMPANY, STATE OF CALIFORNIA STILL HAS THIS REGULATORY INTEREST.

THE COURT: YOUR POSITION ON THAT, THEIR POSITION IS WHAT?

MS. O'MALLEY: THEIR POSITION?

THE COURT: YES. ON THE STATE'S POSITION QUITE ASIDE FROM THE STATUTORY GROUNDS, THIS STATE'S POSITION THEY HAD THEIR OWN STATUTE THAT GIVES THEM SOME BASIS. WHAT'S THE POSITION OF THE UNITED STATES?

MS. O'MALLEY: THE POSITION OF THE UNITED STATES IS THAT THIS CASE CAN BE DECIDED SOLELY ON THE BASIS OF THE STATE STATUTE AND THE STATE REGULATORY INTEREST, AND THAT THERE IS NO NEED TO GO TO AN IMPORTANT CONSTITUTIONAL ISSUE. AND YOU KNOW THE GENERAL RULE BETTER THAN I OR

AS WELL AS I, THAT WE TRY TO AVOID THAT IF WE POSSIBLY CAN.

THE COURT: I THINK WE'RE REQUIRED TO.

[p. 10] MS. O'MALLEY: REQUIRED TO, THAT'S RIGHT, YOUR HONOR.

THE COURT: ALL RIGHT. THAT GIVES ME A LITTLE SUMMARY OF THE RELATIVE POSITIONS AND NOW, AM I CORRECT . . . WELL, LET ME JUST ASK ONE OR TWO THINGS:

WHAT IN REGARD TO THE MOTION TO DISMISS FILED BY THE STATE, DO I TAKE IT THAT THAT [sic] IS – FIRST, LET ME TALK ABOUT THE JURISDICTIONAL.

I DON'T THINK THERE'S ANY QUESTION BUT THAT FEDERAL COURT HAS THE JURISDICTION TO HEAR MATTERS THAT DECIDE ITS OWN JURISDICTION, EVEN THOUGH DECIDE IT DIDN'T HAVE IT, THE MATTERS HEARD AND DECIDED DO NOT LOSE VITALITY, THEY SUPPORT THE ULTIMATE DECISION.

MAYBE WRONG, BUT I THINK WE HAVE THE RIGHT TO HEAR WHETHER OR NOT WE HAVE JURISDICTION, SO WE GET OVER THAT MORE OR LESS CIRCULAR DILEMMA.

SO I UNDERSTAND YOUR POSITION. MR. PELKOFER PARTICIPATING IN THIS DOESN'T MEAN YOU'VE GIVEN UP THAT RIGHT. NOW, A, B, IN REGARD TO THE FEDERAL STATUTE, THE 1988 STATUTE, AS I TAKE IT, THE STATE HAS A MOTION TO DISMISS BASED UPON THAT?

MR. PELKOFER: OUR MOTION IS BASED ON BOTH THAT AS WELL AS THE –

THE COURT: THAT'S ONE OF THE GROUNDS.

MR. PELKOFER: THAT'S ONE OF THE GROUNDS, FIRST. SECOND, WHICHEVER YOUR HONOR PREFERS –

[p. 11] THE COURT: IN SUPPORT OF THAT MOTION THE EVIDENCE YOU WOULD OFFER TO SUPPORT THAT MOTION IS WHAT RELATIVE TO THE ELEMENTS THAT MUST BE SHOWN FOR STATE TO HAVE AN INTEREST IN SUCH A VESSEL AS THIS UNDER THE 1988 FEDERAL STATUTE?

MR. PELKOFER: WE WOULD ARGUE THE SHOWING NECESSARY IS A LIMITED SHOWING. THAT IS, A LIMITED FACTUAL SHOWING. FOR INSTANCE, THAT THE SHIPWRECK IS HISTORICAL, I.E. IT WAS SUNK IN 1856, AND THAT IT HAD PROMINENT PERSONS ON BOARD, IT IS INSTRUMENTAL IN STUDYING LOGGING INDUSTRY IN CALIFORNIA, THINGS OF THAT NATURE.

WE HAVE MADE THOSE SORTS OF STATEMENTS IN OUR PLEADINGS AND WE BELIEVE THAT IN EACH OF THE CASES, THAT IS, WHETHER IT'S – THE QUESTION IS ABANDONMENT, WHETHER THE QUESTION IS HISTORICALNESS, WHETHER THE QUESTION IS EMBEDDEDNESS, WE HAVE ONLY TO MAKE A LIMITED SHOWING TO INDICATE THAT THE ABANDONED SHIPWRECK ACT, IN FACT, DOES APPLY.

THE COURT: HOW ABOUT THE LOCATION OF THE SHIP, IS THAT PERTINENT HERE?

MR. PELKOFER: WE THINK THE LOCATION OF THE SHIP IS VERY PERTINENT, YOUR HONOR. AND WE HAVE – WE HAD A LOCATION FOR THIS SHIP, WHICH THE PLAINTIFF IN HIS, THE BEGINNING OF THIS ACTION IN EFFECT CONCEDED AND SUBSEQUENTLY APPARENTLY DID SOME MORE RESEARCH AND HAS NOW COME UP WITH AN ADDITIONAL LOCATION.

HOWEVER, WE WOULD MAINTAIN AND WE'VE OFFERED SOME [p. 12] AFFIDAVITS IN EVIDENCE IN THE RECORD THAT BOTH LOCATIONS ARE WITHIN THE TERRITORY OF THE SEA AND THEREFORE WITHIN OUR JURISDICTION.

THE COURT: LET'S JUST TALK ABOUT THAT EXAMPLE LOCATION FOR A MOMENT. THE BURDEN OF SHOWING LOCATION IS, YOUR UNDERSTANDING, IS TO SHOW IT'S LOCATED WHERE?

MR. PELKOFER: SO LONG AS IT IS LOCATED WITHIN THE TERRITORIAL SEA WE BELIEVE THAT WE ARE PROPER INTERESTED PARTIES. IF WE ARE NOT, AND WE HAVE ASKED THE PLAINTIFF TO SHOW US OR TELL US WHERE IT IS, AND WE CAN MAKE A DETERMINATION WHETHER IT'S WITHIN THE SEA OR NOT.

THE COURT: I GUESS, I'M LOOKING AT YOUR MOTION, YOU HAVE TO TELL ME WHY IT IS.

MR. PELKOFER: WELL, BECAUSE ALL OF THE EVIDENCE WE HAVE, YOUR HONOR, IN

OUR RECORDS AND THE EVIDENCE THAT'S BEEN FURNISHED, PLUS THE STATEMENT IN THE AFFIDAVIT BY PLAINTIFF'S WITNESS, WOULD INDICATE PLOTTING THAT INFORMATION THAT IT IS WITHIN THE TERRITORIAL SEA.

THE COURT: THE TERRITORIAL REACH IS WHAT?

MR. PELKOFER: IT REACHES –

THE COURT: OF THE STATUTE THREE –

MR. PELKOFER: THREE NAUTICAL OR GEOGRAPHIC MILES OFF THE COAST. THREE NAUTICAL OR GEOGRAPHIC MILES AROUND ISLANDS. DOESN'T FOLLOW THE COASTLINE DIRECTLY.

THE COURT: YOUR VIEW THE VESSEL RESTS IN THAT AREA?

[p. 13] MR. PELKOFER: YES, YOUR HONOR.

THE COURT: YOU HAVE EVIDENCE TO SUPPORT THAT?

MR. PELKOFER: OUR EVIDENCE TO SUPPORT IT IS, OUR INFORMATION WHICH HAS BEEN SUBMITTED, WHICH IS BASICALLY A SPECIFIC LOCATION WHICH WE DOCUMENT THAT WAS PROVIDED TO US AND HAS BEEN IN THE COMMISSION'S RECORDS FOR ANY NUMBER OF YEARS.

AND THEN SUBSEQUENT TO THAT A SUGGESTION THAT THE LOCATION FROM THE PLAINTIFF'S WITNESS IN AN AFFIDAVIT, THE

LOCATION IS SOME ONE AND THREE QUARTER MILES SOUTH OF THAT PREVIOUS LOCATION, WHICH AREA IS ALSO WITHIN THE TERRITORIAL SEA.

THE COURT: ALL RIGHT. YOUR POSITION IS WHAT? IS THAT ADMITTED OR IS THAT – OBVIOUSLY, YOU WOULDN'T BE HERE IF IT WAS.

MR. ALFORD: YOUR HONOR, OUR POSITION IS THAT THE STATE HAS THE BURDEN OF SHOWING THAT IT'S WITHIN THE THREE MILE LIMIT AND THEY HAVE NOT.

THE VESSEL IS LOCATED FOUR AND A HALF MILES OFF THE MAIN BODY OF THE COASTLINE. SOME ARGUMENT IT MIGHT BE WITHIN THREE MILES OF A SMALL ROCK OFF THE COASTLINE.

WE HAVE BEEN – MY CLIENT HAS UNDERSTANDABLY BEEN RELUCTANT TO DISCLOSE THE PRECISE LOCATION BECAUSE A LOT OF PRESS HAS BEEN GENERATED REGARDING THIS MATTER AND THE WRECK IS IN DANGER OF BEING PILLAGED. SO THEY ARE VERY CAREFUL ABOUT DISCLOSING THE EXACT LOCATION, BUT, HOWEVER, OUR MAIN EMPHASIS [p. 14] I THINK IS ON THE OTHER TWO ELEMENTS, WHICH REQUIRE THE ACT TO APPLY.

THE COURT: LET'S TALK ABOUT ABANDONMENT.

MR. ALFORD: I THINK IT'S CLEAR – I'M SORRY.

THE COURT: THE STATE'S POSITION ON ABANDONMENT?

MR. PELKOFER: OUR POSITION IS IT IS ABANDONED.

THE COURT: BASED ON WHAT?

MR. PELKOFER: ON THE FACT THAT IT'S BEEN THERE FOR A HUNDRED AND HOWEVER MANY YEARS, SINCE 1950 WHENEVER. THAT NO ONE HAS MADE ANY EFFORT TO SECURE IT. AND THAT TECHNOLOGY EXISTED TO DO THAT.

AND WHETHER THE INSURANCE COMPANIES PAID OR NOT, AND COUNSEL HAS PROVIDED SOME INFORMATION ON HIS SUBROGATION TO THEIR CLAIMS, HE HASN'T CERTAINLY PROVIDED IT FOR ALL OF THE POSSIBLE CLAIMANTS. AND WE WOULD ARGUE, AND IF WE WERE TO TRY THE MATTER AND ATTEMPT TO PROVE THAT, INDEED, THE INSURANCE COMPANIES THEMSELVES ABANDONED IT. SO WE BELIEVE IT'S ABANDONED.

THE COURT: ALL RIGHT. THE PLAINTIFF'S POSITION ON ABANDONMENT IS WHAT?

MR. ALFORD: FIRST, I THINK WE HAVE TO START FROM THE IMPORTANT PREMISE THE ABANDONED IS NOT FAVORED BY THE LAW, IT REQUIRES A STRONG SHOWING.

THE COURT: I UNDERSTAND. I JUST WANT TO KNOW WHAT YOUR EVIDENCE IS. LET'S ASSUME THEY UNDERSTAND THE PRINCIPLES [p. 15] ABOUT THERE MUST BE SOME DEFINITIVE OR AFFIRMATIVE POSITIVE DECLARATION OR EXECUTION OF BEHAVIOR OF ABANDONMENT BEFORE IT ARISES TO THAT LEVEL,

WHAT IS YOUR EVIDENCE THAT IT HAS NOT BEEN ABANDONED?

MR. ALFORD: OUR EVIDENCE COMES IN THE FORM OF SEVERAL UNCONTROVERTED DECLARATIONS FROM SALVAGE EXPERTS AND MARINE LOCATION EXPERTS WHO SAY THAT UNTIL VERY RECENTLY THE TECHNOLOGY SIMPLY WAS NOT THERE TO FIND THIS VESSEL, TO LOCATE IT OR TO RECOVER IT.

IT'S VERY STORMY WATER OFF THE COAST UP THERE. IT'S FAIRLY DEEP, IT'S COLD, IT'S RUGGED, IT'S ROCKY AND THEY'RE EXTREMELY DIFFICULT CONDITIONS AND UNTIL RECENTLY THE TECHNOLOGY SIMPLY WAS NOT THERE.

THE CRUCIAL THING I THINK TO NOTE IS THE STATE HAS NOT SUBMITTED ONE SHRED –

THE COURT: YOU DON'T HAVE TO STAND. YOU CAN, IF YOU WANT TO, IT'S ENTIRELY UP TO YOU.

MR. PELKOFER: THANK YOU, YOUR HONOR.

MR. ALFORD: I'M SORRY, THE CRUCIAL POINT, THE STATE HAS NOT SUBMITTED ONE SHRED OF EVIDENCE ON THE FEASIBILITY, THE TECHNOLOGICAL FEASIBILITY OF FINDING THAT WRECK. OUR EVIDENCE IS UNCONTROVERTED UNTIL RECENTLY IT WAS SIMPLY NOT FEASIBLE TO FIND IT.

AND THERE'S AMPLE CASE LAW OUT, THEY'RE SAYING WHERE IT'S TECHNOLOGICALLY INFEASIBLE TO FIND THE WRECK, DURING THAT [p. 16] PERIOD OF TECHNOLOGICAL

INFEASIBILITY THEIR COULD BE NO ABANDONMENT. BECAUSE THE LAW IS NOT GOING TO REQUIRE SOMEONE TO LOOK FOR SOMETHING WHEN IT WOULD ENDANGER THEIR LIVES TO DO SO OR PROVE FRUITLESS.

THE COURT: ANY OTHER GROUNDS?

MR. ALFORD: YES, YOUR HONOR. THE GROUNDS ARE THAT, EVEN UNDER THE STATE, THE VERY ACT RELIED UPON BY THE STATE, THE ABANDONED SHIPWRECK ACT, THE GOVERNMENT'S OWN GUIDELINES SAY THERE'S NO ABANDONMENT WHERE INSURANCE COMPANIES HAVE PAID CLAIMS FOR LOSS OF THE VESSEL BECAUSE THOSE INSURANCE COMPANIES TAKE TITLE BY SUBROGATION.

SO UNDER THE GOVERNMENT'S OWN GUIDELINES THERE'S NO ABANDONMENT HERE. THE INSURANCE COMPANIES TOOK TITLE BY SUBROGATION, THEY CONVEYED THAT TITLE TO US AND WE ARE NOW THE OWNERS OF THE VESSEL.

THE COURT: IS THAT IN DISPUTE?

MR. PELKOFER: YES, YOUR HONOR. I HAVE SEEN NO DOCUMENTATION THAT INDICATES THEY OWN IT. BUT EVEN IF THAT IS THE CASE, I WOULD ARGUE, AND I BELIEVE WE COULD PROVE, THAT THE INSURANCE COMPANIES HAD ABANDONED IT.

AND I ALSO, OBVIOUSLY, DISAGREE WITH THE TECHNOLOGY ARGUMENT. I BELIEVE WE COULD PROVE THAT. IF IT WERE MY CONCERN ALL THE WAY THROUGH, THIS HAS BEEN – I EXPRESSED INITIALLY, YOUR HONOR, THAT IS

HOW MUCH ARE WE TO GET INTO THE FACTUAL PROOF OF THESE THINGS?

[p. 17] THE COURT: A MOTION TO DISMISS IS NOT SUBSTITUTE REALLY FOR A TRIAL, AND WHAT WE'RE TALKING ABOUT HERE IS A TRIAL WITH A FINDER OF FACT DECIDING THESE ISSUES. I'M NOT ENTIRELY SURE A MOTION TO DISMISS IS A VEHICLE TO DO IT.

A MOTION TO DISMISS CONTEMPLATES THAT SOMEWHAT LIKE SUMMARY JUDGMENT, THE FACTS ARE NOT IN DISPUTE, AS A MATTER OF LAW THE FACTS AS PLEADED.

LET'S ASSUME THE FACTS AS PLEADED WERE – THAT THEY CONCEDED IT WAS ABANDONED, AND SOMEWHERE IN THE PLEADINGS THEN YOU SAY DISMISSED BECAUSE OF PARAGRAPH 18. PARAGRAPH 18 THEY CONCEDE THAT IT'S ABANDONED AND THAT'S THE ISSUE IN THE CASE, WE DON'T HAVE A TRIAL.

BUT HERE WHAT YOU'RE TELLING ME ARE DIFFERENCES ON FACTUAL PRESENTATIONS THAT COULD HAVE DIFFERENT RESULTS IN TERMS OF ULTIMATE FACTS TO BE FOUND. YOU SEE, THAT'S NORMALLY NOT THE VEHICLE OF A MOTION TO DISMISS. THAT'S WHY I'M ASKING, ARE THESE THINGS AGREED TO OR NOT?

PRESUMABLY, IF ANY ONE OF THESE THREE THINGS IS NOT IN DISPUTE, FOR EXAMPLE, ABANDONMENT OR WHETHER IT'S EMBEDDED, OR WHETHER IT'S MORE THAN THE TERRITORIAL DISTANCE, ANY ONE OF THOSE ELEMENTS IS NOT SATISFIED BY THE STATE, AT

LEAST TO THAT CLAIM, THE STATE CAN'T PREVAIL.

MR. PELKOFER: I UNDERSTAND.

THE COURT: BUT WHAT I'M GETTING HERE IS PLAINTIFFS SAYING, AS YOU TRY TO SHOW IT HAS BEEN ABANDONED, THE [p. 18] PLAINTIFFS SAY WE HAVE EVIDENCE TO SHOW THE TRIER OF FACT COULD DISAGREE WITH THAT AND SHOW INDEED THAT IT WAS NOT.

IF THEY WERE RIGHT JUST ON THAT ONE ELEMENT, IT WOULD SEEM THAT'S ONE OF THREE ELEMENTS THAT CAN'T BE SHOWN, THAT WOULD AT LEAST, AS FAR AS THAT CLAIM IS CONCERNED, BE IN PLAINTIFF'S FAVOR.

SO I'M JUST WONDERING WHAT A MOTION TO DISMISS, WHAT WE'RE DOING HERE. WE SHOULD BE HAVING A TRIAL, I GUESS, SOMEPLACE.

MR. PELKOFER: I CAN'T DISAGREE WITH WHAT YOU'RE SAYING, IF WE'RE DEALING STRICTLY WITH ABANDONED SHIPWRECK ACT.

ON THE OTHER HAND, I THINK THE MOTION TO DISMISS UNDER THE 11TH AMENDMENT AND THE INTEREST SPECIFICALLY, I THINK THIS CASE PARALLELS ALMOST, AS WE SAY IN LAW SCHOOL, ON ALL FOURS WITH THE *MARX VERSUS GUAM* MATTER, WHICH IS THE LAW HERE IN THE 9TH CIRCUIT.

AND I DON'T THINK ANY OF THE SHOWINGS THAT YOU'RE SUGGESTING NEED BE DONE IN ORDER TO QUALIFY ON THAT BASIS WITH THE, PERHAPS THE ONE QUESTION, AND THAT IS THE

LOCATION, WHICH IF THEY CAN SHOW US THAT IT'S OUTSIDE THE THREE MILES WE'LL WALK AWAY.

I DON'T THINK THEY CAN DEMONSTRATE THAT, BUT WE'VE ASKED REPEATEDLY. I DO HAVE INFORMATION WHICH WAS GIVEN ME INFORMALLY ABOUT THE LOCATION THEY ARE NOW SUGGESTING THE SHIP IS AT. THAT'S STILL ALL THE INFORMATION I HAVE WITHIN THAT [p. 19] THREE MILES.

THE COURT: YOUR EVIDENCE SAYS THE LOCATION IS WHAT? I KNOW YOU DON'T WANT TO DISCLOSE WITH SOME GOOD REASON, AT LEAST, UNLESS IT'S COVERED BY SOME SORT OF PROTECTIVE ORDER, BUT YOUR EVIDENCE WOULD BE WHAT?

MR. ALFORD: YOU MEAN, GENERAL DESCRIPTION?

THE COURT: YOU CALL ON THE WITNESS STAND TO SAY THEY DID SOMETHING OR WHAT, WHAT WOULD YOU DO?

MR. ALFORD: YES, WE WOULD CALL A NAVIGATIONAL EXPERT WHO WOULD SAY HE HAD CALCULATED THE COORDINATES BASED ON SATELLITE NAVIGATION SYSTEMS.

I THINK YOU REALLY SEIZED ON THE KEY ISSUE HERE. THIS IS A MOTION TO DISMISS. WE HAVE VERY IMPORTANT DISPUTED ISSUES OF FACT HERE THAT CANNOT BE DECIDED ON THE PLEADINGS, CANNOT BE DECIDED ON THE MOTIONS TO DISMISS.

I THINK THE ABANDONMENT ISSUE REALLY IS KEY. AND THE KEY THING IS THAT THE STATE HAS BROUGHT THE MOTION HERE, IT'S THEIR BURDEN, THEY HAVE NOT SUBMITTED A SHRED OF EVIDENCE. OR, FOR INSTANCE, THE TECHNOLOGICAL INFEASIBILITY ISSUE, AND I THINK THOSE ISSUES CANNOT BE DECIDED ON THE MOTION TO DISMISS.

WE HAVE MADE A SHOWING ON THAT ISSUE. I DON'T THINK IT'S OUR BURDEN, BUT WE HAVE MADE A SHOWING IT'S NOT ABANDONED. CONTRARY TO COUNSEL'S STATEMENT WE HAVE SUBMITTED COPIES OF THE AGREEMENT WITH THE INSURANCE COMPANY SHOWING THEY HAVE SIGNED, HAVE ASSIGNED THEIR TITLE TO US. WE HAVE SUBMITTED DOCUMENTS [p. 20] SHOWING THEY DID PAY CLAIMS ON THE VESSEL.

THE COURT: WELL, OF COURSE, THE STATE SAYS THAT'S VERY WELL, WOULD BE CROSS-EXAMINED AS TO THOSE, INQUIRED AS TO THOSE DOCUMENTS OR PAPERS, THEN AGAIN WE'RE BEYOND THE REACH OF A MOTION TO DISMISS, AGAIN WE'RE IN A TRIAL.

MR. ALFORD: EXACTLY.

THE COURT: THE 11TH AMENDMENT DOESN'T KICK IN REALLY IF THE STATE SHOULDN'T BE IN THE CASE, AND THE STATE MAY NOT BE ENTITLED TO BE IN THE CASE ON ONE OF THE CLAIMS IF THEY CAN'T SATISFY THOSE THREE ELEMENTS UNDER THE 1988 ACT.

MR. ALFORD: EXACTLY.

THE COURT: AGAIN, THE ONLY REASON THE STATE'S IN UNDER THAT ACT, THEY QUALIFY TO HAVE TITLE TO THE PROPERTY, THAT DOES NOT SATISFY THOSE THREE ELEMENTS AND IF THE STATE IS NOT IN IT THERE'S NO 11TH AMENDMENT CLAIMS, RIGHT?

MR. PELKOFER: NO, I DISAGREE. I'M SORRY, IF I MAY?

THE COURT: SURE.

MR. PELKOFER: THE 11TH AMENDMENT ARGUMENT CAN BE COMPLETELY BIFURCATED FROM THE OTHER ARGUMENT, AND THAT IS THAT IS ALL THAT'S REQUIRED UNDER THE 11TH AMENDMENT, IS IF THE STATE OF CALIFORNIA HAS AN INTEREST IN THAT SHIPWRECK, AND IF IT HAS AN INTEREST IN THAT SHIPWRECK THAT MAKES THIS SUIT AGAINST THE STATE, WHICH DEPRIVES THE COURT OF JURISDICTION.

THAT INTEREST CAN BE DEMONSTRATED AND HAS BEEN DEMONSTRATED ENTIRELY APART FROM THE ABANDONED SHIPWRECK ACT. [p. 21] THAT INTEREST IS IN OUR TERRITORIAL SEA. WE HAVE AFFIDAVITS TO PROVE THAT IN THE RECORD.

IN ADDITION TO THAT WE HAVE A STATUTE WHICH REQUIRES ANYONE WHO UNDERTAKES ANY SALVAGE EFFORT WITHIN OUR TERRITORIAL SEA TO HAVE A PERMIT FROM OUR COMMISSION. THAT IS TO PROTECT CULTURAL RESOURCES. WE ALSO HAVE A CLAIM IN OUR STATUTE 6313 TO ALL ABANDONED SHIPWRECKS.

NOW, I GRANT YOU YOU GET SOMEWHAT BACK INTO ABANDONMENT ARGUMENT, BUT ALL THAT'S REQUIRED, WHETHER IT'S *MARX*, WHETHER IT'S *ZYCH* IN THE 7TH CIRCUIT, THE CASES ON THIS SHOW A COLORED TITLE OR COLORED INTEREST IN ORDER TO EXERCISE THAT 11TH AMENDMENT SITUATION AND WE BELIEVE WE'VE DONE THAT.

SO EVEN IF YOUR HONOR IS UNCONVINCED OR BELIEVES TRYING THIS CASE IS NECESSARY, IF WE'RE GOING TO RELY SOLELY ON ABANDONED SHIPWRECK ACT, I CAN'T SERIOUSLY DISAGREE THERE ARE QUESTIONS OF FACT THERE, BUT ON THE OTHER HAND ON THIS ISSUE IF IT'S BIFURCATED I BELIEVE WE'RE ENTITLED TO DISMISSAL ON THAT BASIS.

MR. ALFORD: YOUR HONOR, THE TERM INTEREST IS VERY AMORPHOUS, AND IT'S OUR POSITION THE STATE CANNOT JUST SIMPLY ASSERT THAT IT HAS AN INTEREST WHICH IS DISPUTED AND AUTOMATICALLY DIVEST THIS COURT OF ITS CONSTITUTIONALLY MANDATED AND EXCLUSIVE JURISDICTION.

I MEAN, THE ARGUMENT HERE ABOUT JURISDICTION AND FORUM, I MUST SUBMIT WITH ALL DUE RESPECT IS A LITTLE BIT COY, [p. 22] BECAUSE THE RESULT HERE IF THE COURT FINDS THIS CASE IS BARRED BY THE 11TH AMENDMENT WE'RE LEFT WITHOUT ANY FORUM.

THERE'S PLENTY OF CASE LAW OUT THERE, AND THE CONSTITUTION ITSELF SAYS THESE

MATTERS ARE EXCLUSIVELY WITHIN THE FEDERAL COURT'S JURISDICTION. SO IF THE INTERVENOR SUCCESSFULLY OUSTS US FROM THIS FORUM WE WILL BE LEFT WITH NO FORUM.

THE COURT: I THINK WHAT I'D LIKE TO DO, TAKE A TEN MINUTE RECESS. THEN WHAT I'D; LIKE TO DO IS COME BACK AND HEAR ARGUMENT JUST ON – NOT ON THE ABANDONED SHIPWRECK ACT, JUST ON THE STATE'S POSITION CONCERNING THE OTHER ISSUE HAVING TO DO WITH INTEREST AND HISTORICAL WRECKS AND THE LIKE.

I WANT TO HEAR ABOUT THAT, WHICH WOULD INCLUDE A REFERENCE TO THE ELEMENTS THAT THE STATE MUST ESTABLISH IN ORDER TO PREVAIL AND WHAT YOU THINK ARE CONTRARY TO THAT.

PUTTING ASIDE FOR THE MOMENT THE CLAIM, THAT DOES SEEM TO HAVE SOME FACTUAL DIFFERENCES THAT HAVE TO BE RESOLVED IN A DIFFERENT FORMAT THAN A MOTION TO DISMISS.

NOW, DECIDING THAT JUST SAYING, FOR EXAMPLE, IF THERE'S AN ISSUE AS TO ABANDONMENT IN THAT ONE STATUTE, YOU HAVE A GENUINE DIFFERENCE AS TO WHAT THE EVIDENCE WOULD BE, AND THE BURDEN OF PROOF AND THE WEIGHT OF THE EVIDENCE AND CAN'T – WHY WE CAN'T DO THAT ON THIS VEHICLE. THE OTHER CLAIM THE STATE HAS I'D LIKE THOUGH HEAR YOUR PRESENTATION ON THAT. WE'LL TAKE A TEN MINUTE RECESS AND DO THAT.

[p. 23] (RECESS TAKEN:)

(PROCEEDINGS HELD IN OPEN COURT:)

THE COURT: ALL RIGHT. YOU KNOW THE ISSUE I'D LIKE TO HEAR COUNSEL SPEAK TO. AND MAYBE I SHOULD HEAR FIRST FROM MR. PELKOFER, THE MOVING PARTY ON THE MOTION TO DISMISS, BASED ON THE CALIFORNIA STATUTE AND BRIEFLY THEN I'LL HEAR MR. ALFORD.

MR. ALFORD, YOU'RE WELCOME TO STAND THERE. YOU COULD BE SEATED AND MAKE YOURSELF COMFORTABLE WHILE I HEAR ARGUMENTS.

MR. PELKOFER.

MR. PELKOFER: THANK YOU, YOUR HONOR. BEFORE I ACTUALLY TALK ABOUT THE LEGAL PORTIONS, IF I MAY, IF YOU'LL INDULGE ME JUST A MOMENT, IT SEEMS TO ME A BASIS FOR ALL OF THIS WHOLE LAWSUIT, OUR MOTION AND EVERYTHING ELSE, IS THE LOCATION OF THIS SHIPWRECK.

THE COURT: THAT'S A KEY ISSUE, NO QUESTION ABOUT THAT.

MR. PELKOFER: I CANNOT DISPUTE THAT, AND OUR MOTION WAS FILED, YOUR HONOR, ON THE BEST EVIDENCE THAT WE HAD AS TO THE LOCATION, THAT BEING THE LOCATION FURNISHED US BY THE PRESIDENT OF THIS CORPORATION. HE'S NO LONGER THE PRESIDENT OF PLAINTIFF'S CORPORATION, BUT HE WAS AT THE TIME THE LAWSUIT WAS FILED.

WE USED THAT INFORMATION AND WE DETERMINED THE LOCATION AND DETERMINED IT TO BE WITHIN THE TERRITORIAL SEA. WE READILY CONCEDE THAT IF THE VESSEL IS NOT WITHIN THE [p. 24] TERRITORIAL SEA, THEN WE HAVE NO INTEREST IN THIS MATTER AND SHOULD NOT BE IN THIS LAWSUIT. SO IT SEEMS TO ME THAT'S JUST ABSOLUTELY THE THRESHOLD QUESTION.

NOW, SINCE WE HAVE BEGUN THIS MOTION AND IN PROCEEDING BASED ON THAT, COUNSEL HAS INDICATED IN HIS PLEADINGS AND BY OTHER MEANS, I'VE GOT INFORMATION THAT THIS VESSEL IS ELSEWHERE. IT ISN'T AT THAT LOCATION THAT WE WERE ORIGINALLY FURNISHED.

THE BEST INFORMATION WE HAVE IT'S STILL WITHIN THE TERRITORIAL SEA. HOWEVER, COUNSEL APPARENTLY HAS OTHER INFORMATION. HE SAYS HE'S WILLING TO GIVE THAT TO THE COURT, AND THAT'S FINE, WE THINK IT SHOULD BE GIVEN TO US AS WELL.

IF HE DOES DISCLOSE THAT INFORMATION WE CAN MAINTAIN THE CONFIDENTIALITY. WE HAVE A STATE CODE PROVISION THAT ALLOWS US TO KEEP THAT FROM BEING DISCLOSED, EVEN UNDER PUBLIC RECORDS ACT BECAUSE IT'S AN ARCHAEOLOGICAL SITE AND WE WOULD REQUEST THAT HE DO THAT.

IF, INDEED, IT PROVES TO BE OUTSIDE THE TERRITORIAL SEA, THEN AGAIN WE'RE OUT OF THIS LAWSUIT AND THERE'S NO PROBLEM. IF IT'S WITHIN, THEN OUR – THE ARGUMENT THAT

I'M TO MAKE RELATIVE TO THE 11TH AMENDMENT BEGINS THERE.

THE COURT: THAT ISSUE ON ABANDONMENT ARE TWO ISSUES. THE LOCATION WOULD TRUMP THE WHOLE SITUATION DEPENDING ON WHERE IT IS. LET ME JUST ASK MR. ALFORD THIS:

MR. ALFORD, I TOTALLY UNDERSTAND, AND I THINK YOU'RE [p. 25] JUSTIFIED IN BEING VERY CAREFUL ABOUT THE DISCLOSURE OF THIS INFORMATION, YET WE'VE GOT TO GET TO A POINT WHERE IT'S DISCLOSED.

IF WE HAVE A HEARING IT WILL HAVE TO BE DISCLOSED BECAUSE I THINK THE STATE COULD PROBABLY GET BY ITS BURDEN AT A HEARING WITH RELATIVELY SPARSE BUT REASONABLY RELIABLE INFORMATION, AND WHICH WILL PUT THE BURDEN ON YOU ANYHOW TO SHOW THAT THAT'S NOT RELIABLE, SUFFICIENTLY CREDIBLE TO BE DEEMED TO BE COLORABLE UNDER THE STATE STATUTE.

MY THOUGHT IS, I THINK COUNSEL SHOULD DECIDE ON SOME REASONABLE CONFIDENTIALITY UNDERSTANDING. AND THEN I THINK YOU SHOULD – HAVE YOU SIT DOWN EITHER WITH COUNSEL OR WITH COUNSEL AND THEIR SCIENTISTS WHO WOULD UNDERSTAND YOUR DATA, AND PRESUMABLY COMMUNICATE WITH COUNSEL TO TRY TO, IF YOU WILL, YOU PERSUADE THEM THAT THE PROPERTY ISN'T WHERE THEY THINK IT IS.

BUT FOR SOME REASON YOU STILL HAVE DISAGREEMENT WE'LL HAVE A HEARING, WE'LL

BRING THE PEOPLE IN AND PUT THEM IN THAT CHAIR AND LISTEN TO THE TESTIMONY, TO SEE THE EXTENT TO WHICH SHOULD THEN FIND COLORABLE CLAIM BY THE STATE, THEN PUT IT THROUGH THE 11TH AMENDMENT ROUTE INTO STATE COURT ON THE STATE STATUTE. I THINK THAT'S KIND OF WHERE WE ARE.

ABANDONMENT THE SAME WAY. PROBABLY A LITTLE MORE EVIDENTIARY INSURANCE AND ALL THE TECHNOLOGY AND ALL THAT, WE HAVE TO CONCEDE THAT, BUT I DO THINK LOCATION IS PROBABLY A CROSSROADS HERE, THAT I THINK YOU SHOULD BE TELLING THE STATE [p. 26] ALL YOU HAVE TO TRY TO DISSUADE THEM FROM THINKING THEY HAVE A RIGHT TO BE IN COURT. THAT WOULD BE MY OWN REACTION.

MR. ALFORD: WE CERTAINLY AGREE THAT LOCATION IS SORT OF THE THRESHOLD INITIAL ISSUE, AND WE WOULD NOT BE OPPOSED TO DISCLOSING IT UNDER A CONFIDENTIALITY AGREEMENT OR ORDER FROM THE COURT THAT NOT BE DISCLOSED AND NOT BECOME A PART OF THE PUBLIC RECORD.

THE COURT: COPY SHOULDN'T BE MADE AND COPIES SHOULD BE RETURNED, WHATEVER IS GOING TO BE REASONABLE. YET I THINK INFORMATIVE ENOUGH TO HAVE THE STATE MAKE A REASONED AND RESPONSIBLE REACTION TO YOUR CLAIM HERE.

RIGHT NOW THEY'RE SAYING, LOOK, WE THINK IT'S THERE AND IN THE ABSENCE OF ANYTHING ELSE WE MAKE A CLAIM.

WHAT THEY'RE ASKING FOR IS TELL US WHY THAT'S WRONG. DO YOU THINK WE COULD DO THAT?

MR. ALFORD: I THINK WE COULD.

THE COURT: WITHIN THE NEXT DAY OR SO OR NEXT WEEK?

MR. ALFORD: I THINK WE COULD UNDER A CONFIDENTIALITY ORDER. I WOULD JUST SUGGEST, EVEN IF WE GET BY THAT ISSUE THERE'S STILL IMPORTANT EVIDENTIARY ISSUES HERE. AS THE COURT RECOGNIZED THE ABANDONMENT ISSUE, THE EMBEDDED ISSUE.

THE COURT: YOU'RE ABSOLUTELY CONVINCED IT'S BEYOND THE THREE MILE LIMIT, RIGHT? WELL BEYOND IT?

MR. ALFORD: NO, WE THINK THE DATA IS SOMEWHAT AMBIGUOUS ON THAT. AGAIN, WE WOULD BE GLAD TO SHARE OUR DATA [p. 27] WITH THE STATE UNDER CONFIDENTIALITY ORDER. HOWEVER, I THINK THE KEY, EVEN DESPITE LOCATION THAT'S NOT ENOUGH, IT'S THE FIRST ISSUE, BUT THERE ARE TWO MORE, ABANDONMENT AND EMBEDDEDNESS.

THE COURT: LOCATION IS MORE FINITE. ABANDONMENT HAS SOME OTHER FEATURES TO IT. YOU SAY INSURANCE CLAIMS HAVE BEEN PAID AND, I GUESS, HAVE TO BE PROVEN AND ALL THAT SORT OF THING, BUT LOCATION IS LOCATION.

AND UNLESS IT'S RIGHT ON THE LINE, I GUESS IF IT'S – EVEN IF IT'S – ANY PORTIONS WITHIN THE THREE MILES, I SUPPOSE THE STATE

HAS ITS CLAIM. THAT'S WHAT IT LOCKS ON. THAT'S A FINITE THING. I THINK WE OUGHT TO ADDRESS THAT FIRST.

BUT SECONDLY I'M GOING TO SUGGEST, SEE, WHAT I'M GOING TO SUGGEST IS THIS: I WOULD BE WILLING TO HAVE A HEARING ON THESE NARROW ISSUES FOR THE VANTAGE POINT OF DETERMINING UNDER THE STATE STATUTE COLORABILITY, SO THE STATE CAN THEN SAY, JUDGE, WE HAVE A COLORABLE CLAIM HERE AND THAT KICKS IN PROBABLY THE 11TH AMENDMENT ON THE STATE STATUTE. IT'S NOT THE SAME AS PREPONDERANCE OF THE EVIDENCE.

I'M JUST SAYING I HAVE TO BE SATISFIED THERE'S ENOUGH INTEREST HERE SHOWN TO THE COURT THAT A STATE COURT SHOULD THEN HEAR YOUR ARGUMENTS PRO AND CON. BUT IF IT'S OUTSIDE THE LOCATION WE'RE NOT GOING TO HAVE A HEARING. I THINK MR. PELKOFER AGREES WITH THAT.

MR. ALFORD: I AGREE. I JUST WANT TO BE CLEAR. IN MY [p. 28] OWN MIND I WANT TO MAKE SURE THAT WE'RE IN SOME ACCORD HERE, LOCATION ALONE IS NOT ENOUGH.

THE COURT: AGREED. ABANDONMENT A FEATURE UNDER THE FEDERAL STATUTE. EMBEDDED A FEATURE, I UNDERSTAND THAT. THERE'S A LOT OF ELEMENTS TO THE ABANDONMENT. YOU POINT OUT, YOU CAN'T ABANDON SOMETHING THAT'S UNATTAINABLE. YOU CAN'T GET IT YOU CAN'T ABANDON IT. THAT'S A PRINCIPLE YOU'RE ADVANCING.

ALSO, THE AUTHORITIES IN THIS FIELD THAT EXPRESS ABANDONMENT AS BEING A POSITIVE, DELIBERATE, PURPOSEFUL, UNMISTAKABLE DECLARATION OR CONDUCT OF RELINQUISHMENT. THE CASES AND THE AUTHORITIES SPEAK TO ALL THOSE THINGS. WE MIGHT HAVE TO GET INTO SOME OF THAT, BUT LOCATION MAY BE THE END OF IT.

ABANDONMENT OBVIOUSLY AN ISSUE AND, WELL, COLORABILITY AGAIN FOR THE STATE STATUTE TO CAUSE THIS COURT TO SAY WE DON'T HAVE JURISDICTION AND THE 11TH AMENDMENT OR NOT TO SAY THAT.

MR. PELKOFER: WE'VE TALKED ABOUT LOCATION, WE AGREE, IF THEY'LL FURNISH THAT INFORMATION OR FURNISH IT TO ME WE'LL CHECK IT OUT AND WE'LL EITHER COME BACK AND SAY WE STILL BELIEVE IT'S IN OUR TERRITORY OR NOT. IT SEEMS TO ME UNLESS THEY CAN DISPUTE THAT.

NOW, IF THEY WANT TO ARGUE BEYOND THAT POINT THAT SOMEHOW WE'RE NOT DEFINING OUR TERRITORY PROPERLY, WE GET INTO A WHOLE OTHER MILIEU.

THE COURT: I THINK THAT'S A DIFFERENT STANDARD FOR [p. 29] THIS COURT TO CONSIDER. THAT MAYBE SOMETHING FOR A STATE COURT TO CONSIDER, MAYBE NOT. WE WANT TO KNOW IF IT'S IN OR OUT. MAYBE THAT COULD BE CLEAR.

MR. ALFORD: YOUR HONOR, JUST TO SORT OF CUT TO THE MEAT HERE. WE WOULD AGREE TO PROVIDE THE LOCATION OF THE

WRECK TO THE STATE IF THEY WOULD STIPULATE THAT INFORMATION WOULD NOT BECOME PART OF THE PUBLIC RECORD, WOULD NOT BE PLACED IN THEIR CALIFORNIA WRECK – INVENTORY OF SHIPWRECKS, WOULD NOT BE DISCLOSED.

THE COURT: WHY DON'T YOU DEVELOP WHAT YOU THINK ARE REASONABLE CONDITIONS, THEN I THINK YOU'LL FIND COOPERATION, I THINK, AND I THINK A REASONABLE REQUEST. AND IT MAY BE YOU HAVE SOME THINGS YOU CAN'T AGREE ON YOU SHOULD BRING IT TO THE ATTENTION OF THE COURT AND WE'LL TRY TO HELP YOU GET THROUGH THAT.

MR. PELKOFER: I DON'T THINK WE'LL HAVE A PROBLEM, MR. ALFORD AND I HAVE DEALT VERY GENTLEMANLY LIKE ON THIS WHOLE MATTER.

MR. ALFORD: YES, WE HAVE.

MR. PELKOFER: IF HE'S WILLING TO PROVIDE THE INFORMATION, I'M SURE WE CAN KEEP IT CONFIDENTIAL. BEFORE WE LEAVE – I GATHER YOU'RE CONCLUDING HERE.

THE COURT: FOR TWO REASONS: NUMBER ONE, I THINK WE SHOULD EXPLORE THIS FIRST BECAUSE IT COULD BE RIGHT TO THE POINT. WE GET TO IT ONE WAY OR THE OTHER.

[p. 30] IF NOT, THEN THE SECOND THING WE HAVE TO HAVE A HEARING. I CAN'T DECIDE THIS ON A MOTION TO DISMISS, BUT WHAT I WANT YOU NOW TO TELL ME IN A BRIEF ARGUMENT,

WHAT YOU HAVE TO SHOW TO ME UNDER YOUR 11TH AMENDMENT CLAIM, NOT THE FEDERAL STATUTE, WHAT IS A LEVEL OF PERSUASION THAT HAS – THAT I HAVE TO ACCEPT TO SAY WE HAVE NO JURISDICTION.

MR. PELKOFER: THANK YOU, YOUR HONOR. THAT'S WHAT I HOPED TO DO. ASSUMING FOR THE SAKE OF THIS ARGUMENT IT IS WITHIN OUR TERRITORIAL JURISDICTION, THAT PLACES IT ON SUBMERGED LANDS OF THE STATE OF CALIFORNIA.

THE COURT: IS THAT 6311 OF TITLE –

MR. PELKOFER: I'M NOT SURE WHAT IT IS, YOUR HONOR. THE STATUTE THAT APPLIES TO THIS IS 6303.

THE COURT: THAT'S IT, RIGHT.

MR. PELKOFER: AND THEN 6313 AND THEN 6314, THAT COMPRISES THAT AREA OF THE LAW THAT DEALS WITH SHIPWRECK SALVAGE, ET CETERA.

THE COURT: YES.

MR. PELKOFER: ASSUMING FOR THE SAKE OF ARGUMENT THIS IS NOW ON THE SUBMERGED LANDS IN THE STATE OF CALIFORNIA, THE STATE HAS AN INTEREST WE BELIEVE BASED ON THE NUMBER OF THINGS.

FIRST OF ALL, IT IS ON OUR LAND. WHETHER OR NOT IT'S EMBEDDED, IT SITS ON THE TERRITORIAL SEA BOTTOM AT LEAST OR PERHAPS EMBEDDED IN THE TERRITORIAL SEA, AND THE STATE HAS AN INTEREST WE BELIEVE, IF NOT A

POSSESSORY INTEREST. ALTHOUGH, [p. 31] WE DO CLAIM A POSSESSORY INTEREST BECAUSE IT'S THERE, AGAIN WE GET BACK TO ABANDONMENT.

WE HAVE OTHER INTERESTS WHICH WE BELIEVE ARE PROTECTABLE, NAMELY, THE STATUTORY INTEREST TO PROTECT HISTORIC SHIPWRECKS. AND THE STATE TAKES THE POSITION, BASED ON THE STATUTE IN FRONT OF YOU, THAT REGARDLESS OF THE OWNERSHIP OF A SUNKEN VESSEL, BE IT HISTORIC OR OTHERWISE, IF YOU WISH TO SALVAGE IT YOU'RE REQUIRED TO GET A PERMIT FROM OUR AGENCY.

THAT'S TO PROTECT IN THE CASE OF HISTORICAL OR CULTURAL ARTIFACTS, SO TO MAKE SURE THEY'RE OWNED PROPERLY. EVEN IF NOT THAT ENVIRONMENTAL ISSUES THAT ARISE. SO THE STATE BELIEVES IT HAS LEGITIMATE INTEREST IN ANY SALVAGE ACTIVITY THAT OCCURS WITHIN OUR TERRITORY.

SO IF THAT IS CORRECT, AND WE HARDLY RECOMMEND THAT IT IS CORRECT, THEN THE FACT WHETHER IT'S NOT IT'S ABANDONED, AND I WOULD JUST SUGGEST TO YOU THAT WHILE COUNSEL SAYS, WELL, THEY BOUGHT THIS FROM INSURANCE COMPANIES, THERE ARE PORTIONS OF THAT INSURANCE WHERE THE INSUREDS HAVE NOT BEEN ABLE TO BE LOCATED. THERE'S PERSONAL PROPERTY ON BOARD THAT VESSEL OF ALL KINDS THAT WAS NOT INSURED AND THAT INDEED IS ABANDONED.

AND ONLY TO COMPLICATE THE MATTER MORE, THE STATE HAS MADE A CLAIM IF IT IS ABANDONED AND IT'S ON OUR TERRITORY IT DOES BELONG TO THE STATE. SO PERHAPS IF YOU WERE EVEN TO FIND THAT COUNSEL WAS RIGHT THAT HIS CLIENTS HAD INDEED PURCHASED IT, THEY ONLY PURCHASED PARTS OF IT, THE REST BELONGS TO THE [p. 32] STATE. THE STATE STILL HAS AN INTEREST AND THAT INTEREST IS PROTECTABLE AND THAT'S WHAT WE'RE MOST CONCERNED ABOUT.

THE COURT: ALL RIGHT. SECONDLY, THEN I WANT TO HEAR FROM MR. ALFORD, WHAT IS THE BURDEN OF PROOF YOU HAVE?

WELL, YOU DON'T HAVE TO TELL ME NOW, BUT YOU SHOULD SUBMIT TO ME THE AUTHORITIES THAT SAY THE LEVEL OF PERSUASION THAT YOU HAVE TO HAVE IN THIS COURT OF THOSE ISSUES TO ALLOW YOU TO PREVAIL ON JUST ONE QUESTION: DOES THE COURT HAVE JURISDICTION?

MR. PELKOFER: I THINK THAT THE WORD THAT'S USED IN A NUMBER OF LEADING CASES, THE ONE HERE IS THE *MARX VERSUS GUAM* CASE, THEY TALK ABOUT COLORABILITY.

THE OTHER CASE IN THE MATTER, *ZYCH* CASE WHICH IS OUT OF THE 7TH CIRCUIT IN ILLINOIS, ANOTHER MAJOR CASE I THINK THAT'S EVEN MORE DEFINITIVE BECAUSE THE COURT IN THAT ONE SAYS THAT ONCE THE STATE RAISES THE SPECTER OF A REASONABLE INTEREST THAT THEY HAVE AN INTEREST, THAT'S ALL THAT'S NECESSARY. THEY DON'T

HAVE TO PROVE IT. THEY DON'T HAVE TO ADJUDICATE IT BECAUSE YOU'RE GOING BEYOND THE 11TH AMENDMENT AT THAT POINT. THAT WOULD BE OUR POSITION.

THE COURT: ALL RIGHT. MR. ALFORD, I'D LIKE YOU TO SPEAK TO THAT.

MR. ALFORD: THANK YOU, YOUR HONOR. I KNOW IT'S GETTING LATE. I'LL TRY TO KEEP MY COMMENTS FOCUSED.

I WOULD RESPECTFULLY SUBMIT AS AN INITIAL MATTER IT'S [p. 33] A FAULTY PREMISE THE STATE MIGHT HAVE SOME OTHER PROTECTABLE ENFORCEABLE INTEREST IN THE VESSEL APART FROM THE ABANDONED SHIPWRECK ACT.

I THINK THAT PREMISE THEY MIGHT HAVE AN INTEREST APART FROM THE ABANDONED SHIPWRECK ACT, I THINK IT'S FAULTY FOR TWO REASONS:

THE FIRST IS CONGRESS EXPLICITLY SET OUT BY PASSING THE ABANDONED SHIPWRECK ACT TO DECLARE ONCE AND FOR ALL IN A UNIFORMED WAY WHAT THE RIGHTS WERE WITH REGARD TO HISTORICAL SHIPWRECKS. AND THAT WAS CLEARLY THE INTENT OF CONGRESS TO MAKE THAT UNIFORM, TO MAKE THAT CLEAR THROUGHOUT THE COUNTRY.

SO I THINK IT'S PRETTY CLEAR THAT ACT PREEMPTS ANY CONTRARY STATE LEGISLATION. SO TO THE EXTENT THE STATE STATUTES OR ITS COMMON LAW REGULATORY INTEREST MIGHT BE DIFFERENT FROM, BROADER THAN, NARROWER THAN THE ABANDONED SHIPWRECK

ACT, THE ABANDONED SHIPWRECK ACT PREEMPTS ANY SUCH LEGISLATION.

AGAIN, CONGRESS EXPLICIT SAYS IT IS SETTING OUT TO DECLARE ONCE AND FOR ALL IN A UNIFORM WAY AND CLARIFY WHAT THE RIGHTS ARE WITH REGARD TO SHIPWRECKS OR SHIPWRECKS OF HISTORICAL INTEREST. SO CLEARLY ABANDONED SHIPWRECK ACT IS WHAT CONTROLS HERE. ANY CONTRARY STATE LAW IS PREEMPTED. THAT'S POINT NUMBER ONE.

POINT NUMBER TWO, I THINK THERE'S A CONSTITUTIONALITY QUESTION, IF WE ACCEPT THERE MIGHT BE STATE LAWS REGARDING [p. 34] MARITIME, REGARDING THE DISPOSITION OR OWNERSHIP OF SHIPWRECKS. EVEN THE CASE RECENTLY SUBMITTED BY THE FEDERAL GOVERNMENT IN ITS BRIEF, I BELIEVE, JUST YESTERDAY, *THE GOVERNMENT OF THE VIRGIN ISLANDS* CASE, CLEARLY SAYS THERE'S A LIMIT TO HOW MUCH CONGRESS AND THE STATES CAN LEGISLATE WITH REGARD TO ADMIRALTY MATTERS.

THE LIMITS ARE ONE THE LEGISLATION HAS TO BE UNIFORM THROUGHOUT THE COUNTRY. IF WE ACCEPT THE STATE OF CALIFORNIA HAS ITS OWN UNIQUE LAWS APART FROM THE ABANDONED SHIPWRECK ACT, WHICH ARE DIFFERENT, WHICH GOVERN SHIPWRECKS, IT CLEARLY VIOLATED THE UNIFORMITY PRINCIPLE AND THAT LAW IS IN VIOLATION OF ADMIRALTY LAW, IT'S NOT VALID. THAT'S POINT NUMBER ONE.

POINT NUMBER TWO, THERE'S ANOTHER CONSTITUTIONAL LIMITATION ON LAWS WITH REGARD TO ADMIRALTY, AND THAT IS THAT THE

ADMIRALTY – THE LEGISLATION CANNOT EXEMPT SOMETHING FROM ADMIRALTY WHICH IS CLEARLY WITHIN. AND IN THE CASE, *THE VIRGIN ISLANDS* CASE CITED BY THE GOVERNMENT, THEY SAID THE ABANDONED SHIPWRECK ACT DID NOT VIOLATE THAT PROVISION BECAUSE IT REQUIRED EMBEDDEDNESS.

AND EMBEDDEDNESS WAS REALLY THE KEY. THEY SAID BECAUSE TRADITIONALLY IF SOMETHING IS EMBEDDED IN THE LAND IT'S NOT SUBJECT TO THE LAW OF FINDS OR THE LAW OF SALVAGE. SO EMBEDDED VESSELS WERE NEVER WITHIN THE ADMIRALTY LAWS BECAUSE ADMIRALTY LAW DOESN'T APPLY TO SUCH THINGS, THE LAWS OF FINDS AND SALVAGE DOES APPLY. SO TO THE EXTENT STATE LAW MIGHT NOT [p. 35] REQUIRE EMBEDDEDNESS, RUNS AFOUL OF THAT PROVISION.

SO I THINK WE START FROM A FAULTY PREMISE IN THE BEGINNING, BUT EVEN IF WE ACCEPT THAT PREMISE FOR THE MOMENT, THERE'S POSSIBLY TWO BASES APART FROM THE ABANDONED SHIPWRECK ACT UNDER WHICH THE STATE MIGHT HAVE INTEREST IN THE VESSEL. ONE IS 6313, AND IF YOU LOOK AT 6313, AS I'M SURE THE COURT OBVIOUSLY HAS, ALSO REQUIRES ABANDONMENT. SO WE'RE BACK TO THE EVIDENTIARY QUESTION ABOUT ABANDONMENT.

NUMBER TWO, SOME AMORPHOUS STATE INTEREST APART FROM ANY STATUTE WHATSOEVER, AND THE STATE APPARENTLY CONTENDS THAT BECAUSE THE VESSEL HAS HISTORIC INTEREST IT'S THEIRS.

WELL, THERE ARE A LOT OF THINGS THAT HAVE HISTORICAL INTEREST, THEY DON'T NECESSARILY BELONG TO THE STATE, AND JUST BY THE STATE'S MERE ASSERTION THAT SOMETHING HAS HISTORICAL INTEREST OR HAS A REGULATORY INTEREST IN THE MATTER SHOULD NOT BE ENOUGH TO DIVEST THIS COURT OF ITS EXCLUSIVE JURISDICTION UNDER ARTICLE 3. THERE'S GOT TO BE MORE SHOWING THAN THAT.

I THINK THAT THE KEY IN LOOKING AT ALL THE CASES, THE 11TH AMENDMENT CASES CITED BY THE FEDERAL GOVERNMENT AND THE STATE, IS THAT IN EACH OF THOSE IT WAS UNDISPUTED THAT THE VESSEL WAS WITHIN THE THREE MILE LIMIT. IT WAS UNDISPUTED THE VESSEL WAS EMBEDDED.

IF YOU LOOK AT THOSE CASES THEY TALK ABOUT THE PARTIES AGREEING THAT THE SHIP IS BURIED UNDER THREE-FEET OF SAND OR SOMETHING LIKE THAT. IN ALL OF THOSE CASES IT'S UNDISPUTED THE [p. 36] VESSEL WAS EMBEDDED AND IT'S WITHIN THE THREE MILE LIMIT.

SEVERAL OF THE CASES EVEN UNDISPUTED THE STATE OWNS THE VESSEL AND SALVOR SIMPLY TRYING TO ASSERT A SALVAGE CLAIM AGAINST THE STATE.

NOW, THAT MIGHT BE BARRED BY 11TH AMENDMENT, BUT THIS IS A FAR DIFFERENT CASE.

THE COURT: THAT'S VERY HELPFUL TO HAVE YOUR OBSERVATIONS AND HERE'S WHAT I THINK WE'LL DO: I'D LIKE COUNSEL DO LET ME JUST ASK ONE THING. WOULD YOU BE TALKING TO COUNSEL FOR THE STATE AND GOVERNMENT TODAY OR SOMETHING, TRY TO GIVE THEM SOME –

MR. ALFORD: MONDAY WOULD THAT SUFFICE?

MR. PELKOFER: I'M EMBARRASSED TO SAY MY PLANS CALL FOR ME TO BE OUT OF THE STATE OF CALIFORNIA FOR THE NEXT THREE WEEKS BEGINNING MONDAY. THEY WERE SPECIFICALLY MADE.

THE COURT: IS THERE SOMEONE ELSE THAT CAN TAKE UP THIS ISSUE?

MR. RUSCONI: I WILL BE STEPPING IN.

THE COURT: WE'RE TALKING ABOUT A PHYSICAL FINITE THING. I'M GOING TO ASK –

MR. PELKOFER: HE CAN DO THE CONTACTS.

THE COURT: WHY DON'T YOU DO THAT. GIVE US A REPORT TUESDAY OR WEDNESDAY WHERE YOU THINK YOU ARE ON THOSE CIRCUMSTANCES. LET'S SEE IF WE CAN GET FIRST THE ISSUE OF LOCATION STRAIGHTENED OUT ONE WAY OR THE OTHER. OR AT LEAST [p. 37] NOT STRAIGHTENED OUT, THAT MEANS WE

HAVE TO HAVE SOME SORT OF A HEARING IN THE MATTER.

MR. ALFORD: MIGHT FURTHER BRIEFING ALSO BE APPROPRIATE AT SOME POINT?

THE COURT: I DON'T WANT TO BURDEN YOU WITH MORE, BUT IT WOULD BE HELPFUL TO HAVE YOUR BEST AND MOST SUCCINCT BRIEFS ON THE ISSUE WE JUST TALKED ABOUT NOW.

SEE NOW, FOR EXAMPLE, MR. PELKOFER TOLD US THEY HAVE AN INTEREST IN, LIKE, SAY, A PERMIT TO MAKE SURE THINGS ARE DONE PROPERLY. THAT'S NOT A TITLE INTEREST, THAT'S ON AN OWNERSHIP INTEREST.

THAT MAYBE ENTIRELY COMPATIBLE WITH STATE OR FEDERAL INVOLVEMENT IN THE PROGRAM. TITLE MIGHT BE A FEDERAL MATTER, BUT HOW YOU ENJOY THAT TITLE MIGHT BE SUBJECT TO REASONABLE STATE REGULATION AS TO ENVIRONMENTAL NEEDS AND DEVELOPING YOUR POSSESSORY INTEREST.

SO THOSE THINGS MAYBE DIFFERENT, SO WE COULD VERY WELL END UP IN A CIRCUMSTANCE WHERE WE SAY THE COURT HAS NO JURISDICTION TO CONSIDER THE CONDITIONS UNDER WHICH YOU WILL ENJOY YOUR PROPERTY. YOU HAVE TO GO TO THE STATE AND GET A PERMIT TO DO THAT.

YET THE EVIDENCE SUGGESTS THAT STATE DOES NOT HAVE THE KIND OF INTEREST UNDER THE STATUTE THAT WOULD GIVE THEM ANY

KIND OF POSSESSORY OR TITLE, AS WE EVOLVE, AS WE MOVE THROUGH THIS.

[p. 38] SO YOUR BEST BRIEF MEMORANDUM ON THE POINTS WE DISCUSSED HERE ON THE CITATIONS. THE TWO OR THREE CASES HAVE BEEN HELPFUL. WE'LL WORK ON IT HERE AS YOU'RE WORKING ON IT THERE.

MR. ALFORD: GREAT.

THE COURT: TRY TO CONTACT OUR CHAMBERS HERE TUESDAY OR WEDNESDAY AND TELL US WHERE WE'RE GOING AND WHERE WE ARE.

MS. O'MALLEY: I JUST WANTED TO MENTION, I DON'T THINK THAT THERE WAS ANY REASON FOR THE GOVERNMENT TO FILE A BRIEF ON THIS.

THE COURT: I DO NOT. I SEE NONE NOW. IT'S WELCOME TO DO SO. IT NEED NOT UNLESS THE COURT INVITES SOME OF THE BRIEFS.

MS. O'MALLEY: SOME OF THE MATTERS ADDRESSED THIS MORNING ABOUT PREEMPTION AND UNIFORMITY HAVE BEEN TOUCHED ON BY ME AND MY PRIOR BRIEF.

THE COURT: I THINK WE'RE JUST ONE OR TWO STEPS AT THE MOMENT REMOVED FROM THAT. WHEN THAT COMES INTO PLAY, THAT COULD BE SOMETHING WE'LL WANT TO TAKE UP AND HAVE YOUR INPUT AS WELL.

(THE ABOVE MATTER ADJOURNED)

CERTIFICATE OF REPORTER

I, JAMES YEOMANS, CERTIFIED SHORTHAND REPORTER FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 37 INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING THROUGH THE USE OF THE XSCRIBE COMPUTER SYSTEM TO THE BEST OF MY ABILITY.

DATED: APRIL 15, 1995

/s/ James Yeomans
JAMES YEOMANS,
CSR 4039

USDC SHORTHAND
REPORTER

STIPULATION RE: LOCATION OF THE SHIPWRECK OF *THE BROTHER JONATHAN*

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Attorneys for Plaintiff
DEEP SEA RESEARCH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC., Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant. / STATE OF CALIFORNIA, STATE LANDS COMMISSION, Intervenor, /	No. C 91 3899 LCB STIPULATION RE LOCATION OF THE SHIPWRECK OF *THE BROTHER JONATHAN*

GOVERNMENT OF THE
UNITED STATES
OF AMERICA,
Intervenor.

Plaintiff DEEP SEA RESEARCH, INC., through its attorneys of record herein, hereby stipulates, for purposes of the currently-pending motions only, that the shipwreck of *The Brother Jonathan* is located upon submerged lands of the State of California. However, plaintiff specifically reserves its right to assert and prove that the shipwreck of The Brother Jonathan is not embedded in such lands.

Dated: September 23, 1994 GORDON & REES

By: /s/ Fletcher C. Alford
Fletcher C. Alford

Attorneys for Plaintiff
DEEP SEA
RESEARCH, INC.

Dated: September 23, 1994 STATE OF CALIFORNIA
Department of Justice

By: /s/ Joseph C. Rusconi
Joseph C. Rusconi

Attorneys for the
State of California

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE JUDGE LOUIS C. BECHTLE
ON SEPTEMBER 27, 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
LOUIS C. BECHTLE, JUDGE

DEEP SEA RESEARCH, PLAINTIFF, VS. THE BROTHER JONATHAN, DEFENDANT.	No. C-91-3899 BAC (LCB) TUESDAY, SEPTEMBER 27, 1994 SAN FRANCISCO, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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OFFICIAL REPORTER, USDC

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[p. 3] TUESDAY, SEPTEMBER 27, 1994 9:00 A.M.

THE CLERK: CALLING CIVIL CASE NUMBER 91-3899 DEEP SEA RESEARCH VERSUS THE BROTHER JONATHAN.

COUNSEL, PLEASE STEP FORWARD AND STATE YOUR APPEARANCES FOR THE RECORD.

MR. RUSCONI: GOOD MORNING, YOUR HONOR, JOSEPH RUSCONI, DEPUTY ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA STATE LANDS COMMISSION.

MR. ALFORD: GOOD MORNING, YOUR HONOR, FLETCHER ALFORD FOR PLAINTIFF DEEP SEA RESEARCH.

THE COURT: WHEN WE WERE HERE BEFORE I THINK WE CONCLUDED BY THE PROSPECT THAT THE PARTIES MAY BE ABLE TO RESOLVE SOME OF THE ISSUES BEFORE THEM, AND I THINK YOU HAVE DONE THAT TO A CERTAIN EXTENT, BUT THE MAJOR ONE THAT HAD TO DO WITH THE LOCATION OF THE WRECK AT LEAST FOR OUR PURPOSES IT'S STIPULATED IT IS WITHIN A THREE-MILE RANGE.

MR. ALFORD: THAT'S CORRECT, YOUR HONOR.

MR. RUSCONI: THAT'S CORRECT FOR THE PURPOSE OF THE MOTION TO DISMISS.

THE COURT: THAT'S CORRECT.

I THINK WE FELT THAT THERE WERE CERTAIN – EVERYONE AGREED TO A CERTAIN SECURITY FEATURES ASSOCIATED WITH THE EVIDENCE ON THAT, AND WHERE WE ARE THEN IS ADDRESSING THE MAIN ISSUES, RIGHT?

[p. 4] ALL RIGHT. I THINK THE WAY TO PROCEED HERE IS TO LET ME JUST HEAR FROM THE MOVING PARTY, AND THAT SHOULD GET US INTO A RESPONSE AND ANY REBUTTAL.

THERE ARE A NUMBER OF ISSUES HERE. YOU KNOW THE FEDERAL STATUTE, THE STATE STATUTE, THE ISSUE OF ABANDONMENT OR ISSUE OF EMBEDDEDNESS OR ELIGIBILITY FOR INCLUSION IN THE NATIONAL REGISTER, A LOT OF THINGS TO TALK ABOUT, SO I'M GOING TO LEAVE IT UP TO COUNSEL. I KNOW THAT YOU PREPARED YOUR BRIEF IN SOME CHRONOLOGY HERE IN TERMS OF THE FACTS AS WELL AS THE

TIMING, AND IT MAY BE WELL FOR ME JUST TO BEGIN BY HEARING FROM THE MOVING PARTY.

MR. RUSCONI: THANK YOU, YOUR HONOR. I DO WANT TO MAKE SURE OF THE GROUND RULES, AND THAT IS, THAT THE EVIDENCE WE'RE GOING TO PUT ON ONLY GOES TO THE COLORABILITY OF THE STATE'S CLAIM FOR PURPOSES OF THE MOTION TO DISMISS. AND THAT WE'RE NOT WAIVING THE ELEVENTH AMENDMENT IMMUNITY SHOULD YOU FIND THAT IT DOES APPLY.

THE COURT: THAT'S CORRECT. THERE'S NO WAIVER BY YOUR PRESENTATION HERE TODAY OR UP TO THIS POINT OF YOUR ELEVENTH AMENDMENT IMMUNITY.

MR. RUSCONI: ALL RIGHT.

THE COURT: THAT'S UNDERSTOOD.

MR. ALFORD: (COUNSEL NODS HEAD)

MR. RUSCONI: OKAY. I'D CALL RAND HERBERT, AND I WOULD ASK THAT ALL POTENTIAL WITNESSES BE EXCLUDED FROM THE [p. 5] COURTROOM, YOUR HONOR.

THE COURT: ALL RIGHT. WE COULD HAVE A SEQUESTRATION OF WITNESSES HERE. NORMALLY SEQUESTRATION APPLIES TO – FIRST, WHO IS THIS PERSON?

MR. RUSCONI: HE IS AN EXPERT IN HISTORICAL RESEARCH, YOUR HONOR.

THE COURT: HE'S NOT AN ADVERSE WITNESS, NOT ONE OF THE PLAINTIFF'S CLIENTS?

MR. RUSCONI: NO.

THE COURT: WELL, I'M NOT ENTIRELY SURE WE SHOULD EXCLUDE – YOU MAY COME FORWARD, SIR.

I THINK NORMALLY SEQUESTRATION WOULD BE OFFERED BY MR. ALFORD TO HAVE YOUR WITNESSES SEQUESTERED. I DON'T THINK WE SHOULD SEQUESTER THE OTHERS.

MR. RUSCONI: I'M NOT WORRIED ABOUT THE PARTIES.

THE COURT: UNLESS THERE IS SOME STIPULATION.

MR. RUSCONI: IF HE HAS POTENTIAL WITNESSES, YOU KNOW, THAT WOULD REBUT WHAT MR. HERBERT HAS TO SAY, IT'S UNFAIR THAT –

THE COURT: YOU MAY BE SEATED.

MR. RUSCONI: THAT HE HEARS THE TESTIMONY.

MR. ALFORD: YOUR HONOR, WE WOULD CERTAINLY OBJECT TO THAT. HE'S GOING TO OFFER AN OPINION, AS TO MY UNDERSTANDING, AND I DON'T KNOW THE AUTHORITY FOR EXCLUDING WITNESSES UNDER THAT CIRCUMSTANCE.

[p. 6] THE COURT: I DON'T KNOW ANY BASIS TO SEQUESTER WITNESSES.

MR. RUSCONI: ALL RIGHT, YOUR HONOR.

THE COURT: ANY WITNESSES CALLED BY MR. ALFORD CAN BE CROSS-EXAMINED, AND THE RECORD SHOULD NOTE THIS WITNESS TESTIFIED AND THAT COULD HAVE BEEN A FACTOR IN THE RELIABILITY FEATURE, SO YOUR MOTION TO SEQUESTER IS DENIED UNLESS THERE IS SOME REASON FOR SECURING OTHERWISE, WE CAN DO SO.

MR. RUSCONI: THANK YOU, YOUR HONOR.

THE CLERK: RAISE YOUR RIGHT HAND.

RAND FRANK HERBERT,
INTERVENOR'S WITNESS, SWORN

THE COURT: BEFORE WE BEGIN, I WOULD LIKE YOU – WHAT'S YOUR OFFER WITH THIS WITNESS? YOUR OFFER OF PROOF IS WHAT?

MR. RUSCONI: YOUR HONOR, THIS WITNESS IS GOING TO TESTIFY AS TO THE FACTUAL CIRCUMSTANCES OF THE SINKING OF THE VESSEL, AND HIS RESEARCH, LIMITED AS IT HAS BEEN IN THE LAST WEEK, HAVING TO DO WITH ABANDONMENT OF THE VESSEL.

THE COURT: ALL RIGHT. THAT'S THE OFFER AND HE'S OFFERED FOR THAT REASON.

AND YOU UNDERSTAND YOU'RE UNDER OATH?

THE WITNESS: YES.

THE COURT: YOU MAY PROCEED.

MR. RUSCONI: I'M NOT GOING – WE HAVE A STIPULATION THAT MR. HERBERT IS AN EXPERT IN HISTORICAL RESEARCH. I'M NOT [p. 7] GOING TO EXHAUSTIVELY GO THROUGH HIS CREDENTIALS.

THE COURT: ALL RIGHT. HIS QUALIFICATIONS ARE STIPULATED FOR PRESENT PURPOSES?

MR. ALFORD: YES, YOUR HONOR.

THE COURT: HE'S HERE AS AN EXPERT ON HISTORICAL RESEARCH; IS THAT CORRECT?

MR. ALFORD: THAT'S CORRECT.

THE COURT: ALL RIGHT. YOU MAY PROCEED ON THAT BASIS –

MR. RUSCONI: THANK YOU.

THE COURT: – AS AN EXPERT WITNESS.

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME.

THE WITNESS: RAND FRANK HERBERT. MY LAST NAME IS SPELLED H-E-R-B-E-R-T.

DIRECT EXAMINATION

BY MR. RUSCONI:

Q. MR. HERBERT, WHAT IS THE HIGHEST COLLEGE DEGREE THAT YOU HAVE OBTAINED?

A. I HOLD A MASTER'S DEGREE.

Q. AND WHAT IS THAT IN?

A. HISTORY.

Q. AND WHAT COLLEGE DID YOU GET THAT FROM?

A. UNIVERSITY OF CALIFORNIA AT DAVIS.

Q. AND WHAT DATE?

[p. 8] A. 1977.

Q. WHAT IS YOUR CURRENT OCCUPATION?

A. I DO – I HAVE A BUSINESS THAT DOES HISTORICAL CONSULTING SERVICES AND RESEARCH SERVICES.

Q. AND WHAT ARE YOUR DUTIES IN THAT BUSINESS?

A. I PERFORM HISTORICAL RESEARCH SERVICES AND WRITE REPORTS, GIVE EXPERT WITNESS TESTIMONY WHEN REQUIRED.

Q. ARE YOU A PRINCIPAL IN THE BUSINESS?

A. YES. I'M ONE OF THE OWNERS.

Q. HOW LONG HAVE YOU HAD THIS BUSINESS?

A. SINCE 1981. I HAD A PREVIOUS BUSINESS BEFORE THAT.

Q. HAVE YOU BEEN QUALIFIED AS AN EXPERT WITNESS IN ANY COURT IN THE STATE OF CALIFORNIA?

A. YES.

Q. AND WHAT COURT WOULD THAT BE?

A. IN SACRAMENTO SUPERIOR COURT AND KERN COUNTY SUPERIOR COURT.

Q. WAS THAT IN THE FIELD OF HISTORICAL RESEARCH ALSO?

A. YES.

Q. WHAT TASKS WERE YOU GIVEN BY MY OFFICE IN THIS CASE?

A. I WAS ASKED TO FIND OUT WHAT I COULD ON THE SINKING OF THE BROTHER JONATHAN AND WHAT INFORMATION WE COULD FIND ABOUT THE INSURANCE PARTICULARS OF THE BROTHER JON.

Q. AND WHAT DID YOU DO TO FULFILL THIS TASK?

A. I PERFORMED RESEARCH IN THE UNIVERSITY OF CALIFORNIA AT [p. 9] BERKELEY BANCROFT LIBRARY AND THE SAN FRANCISCO MARITIME MUSEUM, AND THE UNIVERSITY OF CALIFORNIA AT DAVIS LIBRARY.

Q. WERE THERE ANY IMPEDIMENTS TO YOUR RESEARCH?

A. YES, THERE IS A SEVERE ONE. THAT IS THAT THE CALIFORNIA STATE LIBRARIES, CALIFORNIA SECTION IS ONE OF THE REPOSITORIES FOR CALIFORNIA HISTORY IS IN THE PROCESS OF BEING MOVED FROM ONE LOCATION TO ANOTHER AND WAS INACCESSIBLE, ESSENTIALLY INACCESSIBLE.

Q. DID YOU RUN INTO ANY FAILURE OF RECORDS DUE TO ANY OTHER CAUSES?

A. YES.

THE INSURANCE INFORMATION AT THESE LOCATIONS BASED ON TIME WHERE WE COULD GET TO THEM IN THE TIME ALLOWED ARE SCANT.

Q. AND WHAT IS THE REASON FOR THAT?

A. WELL, BECAUSE OF THE EARTHQUAKE AND FIRE IN 1906 IS GENERALLY ASCRIBED TO HAVING DESTROYED MUCH OF THE INSURANCE RECORDS IN THE STATE OF CALIFORNIA.

Q. ALL RIGHT.

COULD YOU JUST BRIEFLY DESCRIBE THE BROTHER JONATHAN, THE TYPE OF VESSEL IT WAS, WHEN IT WAS BUILT?

A. IT WAS BUILT BETWEEN 1850 AND 1851. ROUGHLY TWO HUNDRED FEET LONG. SIDE WHEEL, DOUBLE PADDED SIDE WHEEL OCEAN-GOING STEAMER WITH MASTS AND SAILS.

Q. DID IT –

[p. 10] A. – WITH MASTS AND SAILS.

Q. EXCUSE ME.

WHEN DID IT FIRST ENTER SERVICE IN THE CALIFORNIA TRADE?

A. IN, I BELIEVE IT WAS 1853 OR '54.

Q. AND WHAT WAS ITS ROUTE?

A. ITS FIRST FUNCTION WAS TO TRANS-PORT PASSENGERS AND FREIGHT FROM PANAMA TO SAN FRANCISCO.

THEN AFTER A TIME IT WAS PUT ON THE SAN FRANCISCO TO THE NORTH TO THE OREGON, WASHINGTON, VANCOUVER, CANADA ROUTE.

Q. PRIOR TO ITS SINKING, APPROXIMATELY HOW MANY VOYAGES ON THAT SAN FRANCISCO, PORTLAND ROUTE DID IT MAKE?

A. I DON'T KNOW.

Q. YOU DON'T?

A. NO.

Q. LET'S GET TO THE ACTUAL DETAILS OF THE SINKING.

APPROXIMATELY WHEN DID IT LEAVE SAN FRANCISCO AND WHAT HAPPENED DURING THAT VOYAGE?

A. THE SHIP LEFT SAN FRANCISCO ON JULY 28TH. NEWSPAPERACCOUNTS REPORTED IT WAS A HEAVILY LADEN SHIP.

THE COURT: IN WHAT YEAR?

THE WITNESS: I AM SORRY. 1865.

THE COURT: THANK YOU.

THE WITNESS: THE NEWSPAPER ACCOUNTS REPORTED IT WAS A HEAVILY LADEN SHIP; THAT IT CARRIED AROUND FIFTY CREW-MEN AND [p. 11] TWO HUNDRED TO TWO HUN-DRED TWENTY-FIVE PASSENGERS.

THEY TRAVELED UP THE COAST, STOPPED AT CRESCENT CITY, UNLOADED SOME CARGO, AND THEN LEFT CRESCENT CITY AND TRAVELED NORTH, ENCOUNTERED HEAVY WEATHER AND

DECIDED TO GO BACK TO CRESCENT CITY. ON THE RETURN TRIP TO CRESCENT CITY, STRUCK A ROCK, AND THE SHIP SUNK.

BY MR. RUSCONI:

Q. WAS THERE LOSS OF LIFE?

A. EXTENSIVE LOSS OF LIFE. THERE WERE NINETEEN SURVIVORS.

Q. OUT OF A CREW AND PASSENGER OF HOW MANY?

A. APPROXIMATELY TWO HUNDRED FIFTY PEOPLE. IT'S UNCERTAIN BECAUSE SOME PEOPLE CAME ON BOARD AND DIDN'T APPEAR ON THE LISTS.

Q. ALL RIGHT. LET'S GET TO THE VESSEL.

WHO OWNED THE BROTHER JONATHAN?

A. AT THE TIME IT WAS SUNK, IT WAS OWNED BY THE CALIFORNIA STEAM NAVIGATION COMPANY.

Q. IN YOUR RESEARCH DID YOU FIND ANY REFERENCE TO THE CALIFORNIA STEAM NAVIGATION COMPANY HAVING SURVIVED AS A CORPORATE ENTITY IN ANY FORM?

A. YES. IT SURVIVED PASSED 1865.

Q. I MEAN, IN A MODERN SENSE; IS IT SURVIVING TODAY?

A. NOT TO MY KNOWLEDGE.

Q. DID YOU FIND IN YOUR RESEARCH ANY REFERENCE TO ANYONE OTHER THAN THE

PLAINTIFF IN THIS ACTION CLAIMING OWNERSHIP OF [p. 12] THE VESSEL ITSELF AS OPPOSED TO THE CARGO?

A. NO.

Q. DID YOU FIND ANY REFERENCE IN YOUR RESEARCH TO ANYONE TRYING TO SALVAGE THE VESSEL, AGAIN, AS OPPOSED TO THE CARGO?

A. NO.

Q. DID, IN YOUR RESEARCH, YOU FIND ANY REFERENCE TO THE CALIFORNIA STEAM NAVIGATION COMPANY ITSELF ATTEMPTING TO SALVAGE THE BROTHER JONATHAN AT ANY POINT?

A. NO.

Q. DID YOU FIND ANY REFERENCE TO THE CALIFORNIA STEAM NAVIGATION COMPANY CITING IT AS A LOSS AND WRITING IT OFF FOR ANY PURPOSES?

A. I SAW NO INFORMATION REGARDING THAT.

Q. DID YOU FIND ANY REFERENCE IN YOUR RESEARCH TO THE BROTHER JONATHAN HAVING BEEN INSURED THE VESSEL, AGAIN, AS OPPOSED TO THE CARGO?

A. NOT THE VESSEL, NO.

Q. OKAY. LET'S GET TO THE CARGO.

WHAT DID YOUR RESEARCH SHOW WAS IN THE HOLD OR BEING, CARRIED BY THE BROTHER JONATHAN?

A. THERE IS A VARIETY OF DESCRIPTIONS OF WHAT WAS IN THE HOLD.

A LARGE PIECE OF MINING EQUIPMENT, GENERAL CARGO. SOME SOURCES SIGHT BUTTER, WHISKEY, CIGARS, TOBACCO, TWO CAMELS FOR A CIRCUS, A VARIETY OF PASSENGERS.

[p. 13] OF COURSE, THE PASSENGERS WEREN'T CARGO, BUT ALONG WITH THE PASSENGERS. AND IN THE – ALSO IN THE SHIP WAS A BANK TRANSSHIPMENT OF GOLD COINS AND CURRENCY. AND AN ARMY PAYROLL.

Q. AND WHAT FORM WAS THE PAYROLL IN?

A. CURRENCY.

Q. THAT WAS IN THE SAFE?

A. THE BANK TRANSFER WAS IN THE SAFE. I'M NOT – IT'S NOT CLEAR WHETHER THE ARMY CURRENCY WAS IN THE SAFE OR IN THE PURSER'S HOLD.

Q. WAS THERE ANY REFERENCE IN YOUR RESEARCH TO PASSENGERS HAVING PERSONAL BELONGINGS WITh THEM?

A. OH, YES.

Q. LET'S TURN TO THE QUESTION OF SALVAGE.

ANY REFERENCE IN YOUR RESEARCH TO THE OWNERS OF ANY OF THE CARGO ATTEMPTING TO SALVAGE THE BROTHER JONATHAN?

A. NO.

Q. ANY REFERENCE TO THE UNITED STATES GOVERNMENT TRYING TO SALVAGE THE CURRENCY?

A. NO.

Q. ANY REFERENCE TO WELLS FARGO ATTEMPTING TO SALVAGE THE GOLD?

Q. NO.

Q. ANY REFERENCE TO THE OWNERS OF PERSONAL PROPERTY, SURVIVORS OR SUCCESSORS TO SURVIVORS ATTEMPTING TO SALVAGE [p. 14] THEIR PROPERTY?

A. ONLY IN THE SENSE OF STUFF THAT WAS WASHED ASHORE, THOSE 3 THINGS WERE RECOVERED.

THE COURT: BUT NOT TO THE SITE.

THE WITNESS: RIGHT. NOT TO THE SITE.

THE COURT: HOW DEEP WAS THE WATER WHERE IT SANK?

THE WITNESS: THAT WAS UNCERTAIN AT THE TIME THAT IT SUNK. I'M NOT SURE HOW DEEP IT IS NOW. I BELIEVE IT'S TWO HUNDRED ODD FEET.

THE COURT: TWO HUNDRED ODD FEET?

THE WITNESS: YEAH.

THE COURT: ALL RIGHT.

BY MR. RUSCONI:

Q. LET'S TURN TO THE QUESTION OF INSURANCE.

I'D LIKE TO HAVE THIS MARKED AS PLAINTIFF'S 1 – IT'S INTERVENOR'S 1, I AM SORRY.

THE COURT: LET'S CALL THIS C FOR CALIFORNIA. C-1. I THINK THAT WOULD BE BETTER. THANKS.

MR. RUSCONI: ALL RIGHT.

BY MR. RUSCONI:

Q. MR. HERBERT, I WOULD ASK YOU TO IDENTIFY THIS FOR ME?

(EXHIBIT HANDED TO WITNESS)

A. THIS IS A COPY OF A NEWSPAPER CLIPPING. IT'S FROM THE *SAN FRANCISCO BULLETIN* DATED AUGUST 2ND, 1865. IT'S FROM A COLLECTION OF MATERIALS AT THE STATE LIBRARY THAT WE OBTAINED [p. 15] ON AN EMERGENCY BASIS REGARDING THE BROTHER JON.

Q. AND IS THAT A TRUE AND CORRECT COPY OF WHAT YOU OBTAINED FROM THE STATE LIBRARY?

A. YES.

Q. AND DID YOU FIND IT IN A PLACE WHERE YOU WOULD EXPECT THIS TYPE OF ARTICLES TO BE FOUND?

A. OH, YES.

Q. AND WAS THE ARTICLE IN SUCH A CONDITION AS TO LEAD YOU TO CONCLUDE THAT IT WAS A TRUE AND CORRECT COPY OF THE ORIGINAL NEWSPAPER ARTICLE?

A. YES. I WOULD HAVE GOTTEN THE ARTICLE FROM THE *BULLETIN*, BUT THE *BULLETIN* IS UNAVAILABLE IN THE MICROFILM.

Q. DID ANY SUSPICION ARISE IN YOUR MIND AS TO THE AUTHENTICITY OF THAT?

A. NO.

Q. I WOULD LIKE YOU TO SPECIFICALLY TURN TO THE RIGHT-HAND COLUMN ON THE FRONT PAGE WHICH SEEMS TO LIST SOME FIGURES.

AND PLEASE TELL US WHAT THAT IS?

A. IT'S A DESCRIPTION OF THE INSURANCE AND CARGO – OR A DESCRIPTION OF THE CARGO AND INSURANCE ON THE CARGO ON THE BROTHER JONATHAN.

Q. WOULD YOU READ THAT INTO THE RECORD PLEASE?

A. IT NOTES: THE BROTHER JONATHAN CARRIED A VALUABLE CARGO ON WHICH THERE WERE INSURANCE IN SAN FRANCISCO OFFICES AS FOLLOWS:

[p. 16] CALIFORNIA INSURANCE COMPANY, TWENTY THOUSAND DOLLARS;

CALIFORNIA LLOYDS THIRTEEN THOUSAND SIX HUNDRED NINETY DOLLARS;

MERCHANTS MUTUAL TEN THOUSAND DOLLARS;

BIGELOW BROTHERS TWO THOUSAND FIVE HUNDRED DOLLARS; AND

FALKNER, BELL & COMPANY TWO THOUSAND THREE HUNDRED DOLLARS.

FOR A TOTAL OF FORTY-EIGHT THOUSAND FOUR HUNDRED NINETY, AND ADDS THAT PROBABLY TWO-THIRDS OF THE CARGO WAS UNINSURED.

Q. HAVE YOU EXAMINED THE AFFIDAVIT OF DAVID L. FLOHR THAT WAS FILED IN THIS MOTION?

A. YES.

Q. AND HE LISTS SOME FIGURES FOR INSURANCE.

AND HOW DO THEY COMPARE TO THE FIGURES FROM THIS ARTICLE?

A. THEY'RE PRETTY CLOSE. NOT EXACTLY THE SAME, BUT VERY CLOSE.

Q. DOES THE ARTICLE SAY ANYTHING ABOUT THE VESSEL ITSELF HAVING BEEN INSURED?

A. NO.

Q. AND IS THERE ANYTHING EITHER IN THIS ARTICLE OR IN YOUR RESEARCH THAT TIED THIS INSURANCE TO THE SPECIFIC PIECES OF [p. 17] CARGO?

A. NO. I FOUND NOTHING THAT WOULD INDICATE WHICH PIECES OF – WHICH PARTS OF THE CARGO WAS CONNECTED WITH WHICH POLICY AMOUNTS.

Q. SO AS FAR AS YOUR RESEARCH HAS SHOWN, IT COULD HAVE ALL BEEN FOR THE TWO CAMELS?

A. IT'S POSSIBLE. I FOUND NOTHING TO SPECIFY WHICH IS WHICH.

MR. RUSCONI: I WOULD OFFER THIS INTO EVIDENCE, YOUR HONOR.

THE COURT: ANY OBJECTION?

MR. ALFORD: NO OBJECTION, YOUR HONOR.

THE COURT: RECEIVED IN EVIDENCE. C-1.

(INTERVENOR'S EXHIBIT C-1
RECEIVED IN EVIDENCE)

BY MR. RUSCONI:

Q. ALL RIGHT.

DID YOUR INVESTIGATION SHOW THAT THERE WAS ANY ATTEMPTS AT SALVAGE OF THE BROTHER JONATHAN?

A. THERE IS A NUMBER OF ACCOUNTS OF ATTEMPTS TO SALVAGE THE BROTHER JONATHAN. NOTICES IN THE NEWSPAPERS THROUGH THE LATE 19TH CENTURY AND INTO THE EARLY 20TH CENTURY WHERE THERE ARE DESCRIPTIONS OF EXPEDITIONS TO TRY TO RECOVER THE CARGO, OR THE TREASURE GENERALLY IS THE TERM.

Q. AND WHO IN YOUR RESEARCH WERE THE PARTIES THAT INSTITUTED THESE SALVAGE ATTEMPTS?

[p. 18] A. SPECIFICALLY OR –

Q. SPECIFICALLY.

A. – WERE THEY REPRESENTED BY ANYONE?

Q. BOTH. SPECIFICALLY AND REPRESENTATIONAL ONES.

A. I NEED TO REVIEW MY NOTES FOR THE SPECIFIC NAMES OF THE PARTIES.

Q. WERE ANY OF THE PEOPLE, WITHOUT READING YOUR NOTES, THE OWNERS OF CARGO OR OF THE VESSEL?

A. NO.

Q. SO THEY WERE INDEPENDENT PARTIES OUT THERE?

A. THAT'S RIGHT.

Q. MR. HERBERT, IN YOUR EXPERT OPINION WHAT IS THE HISTORICAL SIGNIFICANCE OF THE BROTHER JONATHAN?

A. WELL, IT'S A – HOW DO I SAY – IT'S A FAMOUS SHIPWRECK ON THE PACIFIC COAST. IT WAS KNOWN AS ONE OF THE GREATEST MARITIME DISASTERS OF THE PACIFIC COAST IN TERMS OF LOSS OF LIFE.

IT'S FAMOUS FOR ITS – THE FACT THAT IT WAS CARRYING CURRENCY AND TREASURE, AND IT'S ALSO FAMOUS FOR SOME OF THE PASSENGERS WHO DIED, SOME FAIRLY PROMINENT PERSONS WHO DIED ON THE SHIP.

Q. AND WHO WERE THEY?

A. ONE WAS GENERAL WRIGHT WHO WAS GOING TO COMMAND THE NORTHERN DISTRICT

FOR THE ARMY. THE RECENTLY APPOINTED GOVERNOR OF THE WASHINGTON TERRITORY, AND THEN A NUMBER OF [p. 19] OTHER – OF COURSE, A NEWSPAPER EDITOR FROM THE SAN FRANCISCO NEWSPAPERS. AND, OF COURSE, THEN A VARIETY OF GENERAL PASSENGERS. THIS SEEMED TO GET A LOT OF PLAY IN THE NEWSPAPER AS A HEART-RETCHING [sic] STORY.

Q. HAS IT CONTINUED TO GET REFERENCES IN NEWSPAPER ARTICLES THROUGH THE YEARS?

A. YES, IN GENERAL. THERE HAS REMAINED AN INTEREST IN THE STORY OF THE BROTHER JONATHAN, THE IDEA OF RECOVERING THE TREASURE AND SO ON.

Q. HAVE YOU CONTACTED WELLS FARGO IN REFERENCE TO THIS CASE?

A. YES. IN TRYING TO FIND OUT ABOUT THE INSURANCE ASPECTS OF THE CASE, I THOUGHT TO CONTACT THE HISTORICAL SERVICES DEPARTMENT TO FIND OUT WHETHER THEY HAD INFORMATION.

AND I SPOKE WITH A CURATOR MARY ANN BAGLE (PHONETIC) ABOUT THE – WHETHER OR NOT WELLS FARGO HAD INSURED THE CARGO, AND WHAT INFORMATION THEY MIGHT HAVE.

Q. AND WHAT DID THAT RESULT IN?

A. SHE SAID THAT AT THE TIME OF THE SINKING, WELLS FARGO WAS A SELF-INSURED COMPANY, AND THAT THEY DID NOT CARRY INSURANCE ON THEIR CARGOES. THEY – SHE SAID THAT ALMOST EVERY SHIP LEAVING THE

BAY WOULD HAVE HAD A WELLS FARGO TRANSFER ON IT.

MR. ALFORD: I WOULD OBJECT TO THAT QUESTION IN RESPONSE AND ASK IT BE STRICKEN. IT'S HEARSAY AS TO THE TRUTH OF THE MATTER ASSERTED

THE COURT: I SUPPOSE IT IS.

[p. 20] MR. ALFORD: AS TO WHETHER OR NOT THE TRANSFER WAS INSURED, THE TRUTH OF THE MATTER ASSERTED, THAT IS CLEARLY WHAT'S BEING OFFERED FOR IT'S HEARSAY AND INADMISSIBLE FOR THE TRUTH.

MR. RUSCONI: I'M OFFERING IT ONLY AS TO WHAT – I UNDERSTAND THAT THIS PERSON COULD NOT BIND WELLS FARGO, BUT JUST AS A HISTORICAL CURATOR AT WELLS FARGO WHAT HER IMPRESSION WAS.

THE COURT: I'LL SUSTAIN THE OBJECTION. I THINK IT'S OFFERED FOR THE TRUTH OF WHAT SHE SAID, HER BELIEFS AND IDEAS. IT COMES FROM A PERSON, A HUMAN BEING AS OPPOSED TO AGENT OR HISTORICAL DOCUMENT. I'LL SUSTAIN THE OBJECTION.

MR. ALFORD: THANK YOU, YOUR HONOR.

THE COURT: NOT THE RELEVANCE OF THE INFORMATION, JUST THE MANNER IN WHICH IT COMES IN.

MR. RUSCONI: CERTAINLY.

BY MR. RUSCONI:

Q. DID SHE INDICATE TO YOU THAT SHE HAD HAD ANY INQUIRIES AS TO THE BROTHER JONATHAN JUST IN GENERAL THROUGH THE YEARS?

A. YES. SHE MENTIONED THAT THE BROTHER JONATHAN WAS – SHE RECEIVED REQUESTS ABOUT THE BROTHER JONATHAN BETWEEN TWO AND THREE TIMES A YEAR FOR ADDITIONAL INFORMATION.

Q. TO YOUR KNOWLEDGE ARE THERE OTHER LIKE GOLD RUSH ERA WRECKS OF THIS TYPE ON THE PACIFIC COAST OF CALIFORNIA?

A. IN INLAND WATERS, YES, THERE ARE. AND I BELIEVE THERE IS [p. 21] ONE OFF OF ONE OF THE CHANNEL ISLANDS.

Q. OTHER THAN THAT?

A. NO, NOT TO MY KNOWLEDGE.

MR. RUSCONI: THAT CONCLUDES MY DIRECT EXAMINATION, YOUR HONOR.

THE COURT: THANK YOU. MR. ALFORD, YOU MAY ASK THE WITNESS SOME QUESTIONS.

MR. ALFORD: THANK YOU, YOUR HONOR.

THE COURT: CROSS-EXAMINATION.

CROSS-EXAMINATION

BY MR. ALFORD:

Q. MR. HERBERT, WHEN WERE YOU FIRST CONTACTED BY THE STATE OF CALIFORNIA TO RESEARCH THE HISTORY OF THE BROTHER JONATHAN?

A. A WEEK AGO MONDAY.

Q. A WEEK FROM YESTERDAY?

A. YES.

Q. AND YOU SAID YOU VISITED THREE LIBRARIES IN DOING YOUR RESEARCH?

A. YES.

Q. HOW MUCH TIME IN TOTAL DID YOU SPEND IN THOSE THREE LIBRARIES? I'M NOT TALKING ABOUT TRAVEL TIME, BUT ACTUALLY DOING RESEARCH IN THOSE THREE LIBRARIES?

A. THE MARITIME MUSEUM I SPENT – THE AVAILABLE TIME IN THE AFTERNOON. THEIR HOURS ARE LIMITED. I BELIEVE THAT WAS WEDNESDAY.

[p. 22] Q. HOW MUCH TIME ON WEDNESDAY DID YOU SPEND?

A. FOUR HOURS. THE BANCROFT LIBRARY I SPENT LIKE SIXTEEN. AND THE UNIVERSITY OF CALIFORNIA LIBRARY I SPENT – ACTUALLY I HAD AN ASSISTANT PULL SOME MATERIALS FOR ME AT THE UNIVERSITY OF CALIFORNIA, SECONDARY MATERIALS.

Q. YOU ACTUALLY DID NOT GO TO THAT LIBRARY YOURSELF?

A. NO, NOT – I TAKE THAT BACK. I ACTUALLY DID. FOR THIS ONE I WENT AND LOOKED AT SOME NEWSPAPERS AVAILABLE ON MICROFILM AT THE LIBRARY.

Q. HOW LONG WERE YOU THERE?

A. ABOUT TWO HOURS.

Q. IN YOUR HISTORICAL RESEARCH, DID YOU FIND ANY DOCUMENTS OR OTHER EVIDENCE INDICATING THAT THE ORIGINAL OWNERS OF THE VESSEL HAD – I AM SORRY, LET ME TRY THAT AGAIN.

IN YOUR HISTORICAL RESEARCH, DID YOU FIND ANY EVIDENCE THAT THE OWNERS OF THE BROTHER JONATHAN, THE ORIGINAL OWNERS, HAD DISCLAIMED ANY FURTHER OWNERSHIP INTEREST IN THE VESSEL?

A. YOU MEAN PUBLICLY ANNOUNCING WE DON'T CLAIM THE VESSEL AT ANY TIME?

Q. THAT'S RIGHT.

A. NO.

Q. YOU DID NOT?

A. NO, I DID NOT.

Q. DO YOU HAVE ANY EXPERTISE IN UNDERWATER DIVING?

[p. 23] A. NO.

Q. DO YOU HAVE EXPERTISE IN SONAR LOCATION TECHNOLOGY?

A. NOT IN THE LEAST.

Q. DO YOU HAVE ANY EXPERTISE IN THE AREA OF MARINE SALVAGE?

A. NO.

Q. SO YOU DON'T HAVE ANY OPINION TODAY AS TO WHETHER OR NOT IT WAS AT ANY TIME TECHNOLOGICALLY FEASIBLE TO SALVAGE THE BROTHER JONATHAN, DO YOU?

A. NO. I HAVE SIMPLY JUST DONE READING ON THE SUBJECT, BUT NO, I'M NOT AN EXPERT IN THAT.

Q. OKAY, THANK YOU.

WERE YOU ABLE TO DETERMINE FROM YOUR RESEARCH THAT NO SALVAGE EFFORTS WERE MADE BY THE ORIGINAL OWNERS OF THE BROTHER JONATHAN OR ITS CARGO?

A. I SAW NOTHING THAT SAID THAT THAT HAD HAPPENED.

Q. BUT YOU SAW NOTHING THAT SAID THAT IT HADN'T HAPPENED EITHER?

A. THAT'S RIGHT. THAT'S RIGHT.

I DIDN'T – YOU HAVE TO UNDERSTAND THAT WHEN YOU'RE TALKING ABOUT A NEWSPAPER ARTICLES [sic] – HOW DO I SAY THIS.

THE BROTHER JONATHAN WAS A POPULAR SUBJECT. AND SO THE NEWSPAPERS NOTED WHEN PEOPLE WERE SAYING THEY WERE TRYING TO ATTEMPT TO REACH THE BROTHER JONATHAN.

I REMEMBER THE *YREKA JOURNAL* HAD AN ARTICLE ABOUT SOMEONE TRYING TO SALVAGE THE TREASURE.

[p. 24] Q. YOU SAW SEVERAL ARTICLES IN THE HISTORICAL RECORD NOTING THAT SALVAGE EFFORTS WERE MADE?

A. RIGHT. OR THAT PEOPLE WERE PLANNING TO DO SO.

Q. BUT YOU SAW NO ARTICLES INDICATING THAT THE ORIGINAL OWNERS OF THE VESSEL OR ITS CARGO HAD NO INTENT ON MAKING SALVAGE EFFORTS, DID YOU?

A. NO.

Q. OKAY.

ARE YOU FAMILIAR WITH THE NATIONAL REGISTER OF HISTORICAL PLACES?

A. YES.

Q. IS THE BROTHER JONATHAN LISTED IN THE NATIONAL REGISTER OF HISTORICAL PLACES?

A. NO, IT'S NOT.

Q. CAN A STATE OR A STATE AGENCY NOMINATE A HISTORICAL SITE FOR INCLUSION IN THE NATIONAL REGISTER OF HISTORICAL PLACES?

A. TO MY KNOWLEDGE ANYONE CAN NOMINATE.

Q. INCLUDING THE STATE OR ONE OF ITS AGENCIES?

A. YES.

Q. HAS THE STATE OF CALIFORNIA OR ANY OF ITS AGENCIES NOMINATED THE BROTHER JONATHAN FOR INCLUSION IN THE NATIONAL REGISTER –

MR. RUSCONI: YOUR HONOR, I OBJECT AS BEYOND HIS EXPERTISE.

THE COURT: I'LL LET HIM ANSWER THAT AS PART OF THE [p. 25] OVERALL HISTORY OF THE SHIP.

THE WITNESS: I DON'T KNOW.

THE COURT: ANY ONE ELSE NOMINATED, ANY INDEPENDENT AGENCY?

THE WITNESS: NO. THE ONLY THING I'VE SEEN FROM THE STATE WAS A LETTER FROM THE STATE OFFICES OF HISTORIC PRESERVATION SAYING THAT THEY BELIEVED THAT IT WAS A POTENTIALLY ELIGIBLE PROPERTY.

BY MR. ALFORD:

Q. ARE YOU FAMILIAR WITH THE FORMAL NOMINATION PROCESS FOR LISTING IN THE REGISTER?

A. YES.

Q. AND DID THAT LETTER THAT YOU SAW CONSTITUTE A FORMAL NOMINATION OF THE BROTHER JONATHAN?

A. NO.

Q. IT DID NOT.

ON EXHIBIT C-1 THERE ARE SEVERAL INSURANCE COMPANIES LISTED?

A. YES.

Q. DID YOU CONTACT ANY OF THOSE INSURANCE COMPANIES?

A. TO MY KNOWLEDGE NONE OF THEM – WELL, TO MY KNOWLEDGE THERE'S . . . BASED ON THE AFFIDAVIT THERE IS ONLY ONE THAT IS STILL DOES EXIST.

I HAD NO TIME TO CONTACT ANY INSURANCE COMPANY.

Q. YOU HAD NO TIME TO DO ANY RESEARCH OF YOUR OWN ON THE [p. 26] ISSUE OF WHETHER OR NOT ANY OF THE INSURANCE COMPANIES LISTED ON EXHIBIT C-1 STILL EXIST; IS THAT CORRECT?

A. RIGHT.

Q. SO YOU DIDN'T MAKE ANY EFFORTS TO CONTACT THEM?

A. I HAD NO TIME TO DO SO.

Q. AND YOU DON'T KNOW IF THEY UNDERTOOK ANY SALVAGE EFFORTS?

A. NO.

MR. ALFORD: THANK YOU. NO FURTHER QUESTIONS.

THE COURT: MR. RUSCONI, ANYTHING FURTHER?

MR. RUSCONI: NO REDIRECT, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN, MR. HERBERT. THANK YOU FOR COMING.

MR. RUSCONI: AND NOW I'LL CALL JOHN W. FOSTER, YOUR HONOR.

THE COURT: ALL RIGHT.

THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

JOHN W. FOSTER, INTERVENOR'S WITNESS, SWORN

MR. RUSCONI: YOUR HONOR, WE ALSO HAVE STIPULATED TO THE EXPERTISE OF MR. FOSTER IN THE FIELD OF MARINE ARCHAEOLOGY.

THE COURT: ALL RIGHT.

MR. ALFORD: THAT'S CORRECT, YOUR HONOR.

THE COURT: VERY WELL.

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME.

[p. 27] THE WITNESS: MY NAME IS JOHN WEAVER FOSTER. F-O-S-T-E-R.

DIRECT EXAMINATION

BY MR. RUSCONI:

Q. MR. FOSTER, WHAT IS THE HIGHEST COLLEGE DEGREE WHICH YOU HAVE OBTAINED?

A. A MASTER'S DEGREE.

Q. IN WHAT FIELD IS THAT IN?

A. ANTHROPOLOGY WITH A SPECIALTY IN ARCHAEOLOGY.

Q. WHAT INSTITUTION DID YOU GET THAT FROM?

A. CAL STATE LONG BEACH.

Q. AND WHAT YEAR WAS THAT?

A. 1973.

Q. WHAT IS YOUR CURRENT OCCUPATION?

A. I'M THE SENIOR STATE ARCHAEOLOGIST WITH THE DEPARTMENT OF PARKS AND RECREATION IN SACRAMENTO.

I'M ALSO THE STATE UNDERWATER ARCHAEOLOGIST.

Q. AND WHAT ARE YOUR DUTIES IN THAT POSITION?

A. I OVERSEE THE ARCHAEOLOGY AND HISTORY FOR THE DEPARTMENT OF PARKS AND RECREATION AND REPRESENT THE STATE OF CALIFORNIA IN ISSUES OR QUESTIONS RELATED TO HISTORY AND ARCHAEOLOGY, AND RELATED MATTERS.

Q. AND DO YOU HAVE A SPECIAL FIELD THAT YOU -

A. I HAVE A NUMBER OF SPECIALTIES, AMONG WHICH IS MARINE ARCHAEOLOGY. YES, SIR.

[p. 28] Q. WHEN DID YOU FIRST BECOME AWARE OF THE WRECK OF THE BROTHER JONATHAN IN YOUR CAREER?

A. OH, I'D SAY ABOUT FIFTEEN YEARS AGO I BECAME AWARE OF THE BROTHER JONATHAN IN CONDUCTING SOME RESEARCH ON GOLD RUSH, AND THE MARITIME ASPECTS OF THE GOLD RUSH IN CALIFORNIA.

Q. AND HAVE YOU HAD INQUIRIES AND FAMILIARITY WITH THE BROTHER JONATHAN FROM THAT TIME FORWARD?

A. YES.

I'VE WORKED IN CONSULTATION WITH THE STATE LANDS COMMISSION OVER THE YEARS ON ISSUES RELATED TO THE BROTHER JONATHAN.

Q. ALL RIGHT.

TURNING TO THE NATIONAL REGISTER OF HISTORICAL PLACES COULD YOU DEFINE THAT FOR ME? WHAT IS THE REGISTER?

A. WELL, THE REGISTER IS THE OFFICIAL LISTING OF HISTORIC PROPERTIES IN THE UNITED STATES WHICH ARE SIGNIFICANT TO THE HISTORICAL PATRIMONY OF OUR COUNTRY.

SO IT'S THE PRIMARY REFERENCE TOOL FOR INCLUDING THOSE PROPERTIES WHICH HAVE SIGNIFICANT HISTORIC VALUE TO THE PEOPLE OF THE UNITED STATES.

Q. AND WHAT IS THE PROCESS FOR DESIGNATION OR FOR – YES, EXCUSE ME, STRIKE THAT – FOR DESIGNATION OF A SITE TO THE NATIONAL HISTORICAL?

A. WELL, THE PROCESS BEGINS WITH RESEARCH AND THE COMPLETION OF A NOMINATION FORM, WHICH IS A FAIRLY COMPREHENSIVE PROCESS, [p. 29] INCLUDING HISTORICAL RESEARCH AND DESCRIPTIVE INFORMATION ABOUT THE STATUS OF THE PROPERTY.

THAT PACKAGE IS ASSEMBLED AND IT IS SUBMITTED TO THE STATE OFFICE OF HISTORIC PRESERVATION IN SACRAMENTO FOR THEIR STAFF REVIEW.

THE REVIEW ASSESSES THE ADEQUACY OF THE DOCUMENTATION THAT'S PRESENTED, AND WHEN THAT – WHEN THAT PACKAGE IS COMPLETE, IT'S FORWARDED TO THE STATE HISTORICAL RESOURCES COMMISSION FOR AN OFFICIAL DETERMINATION AS TO ITS ELIGIBILITY, THAT IS, THE PROPERTY'S ELIGIBILITY.

IF THE COMMISSION DETERMINES THE PROPERTY TO BE ELIGIBLE, THE PACKAGE IS FORWARDED TO THE KEEPER OF THE REGISTER IN WASHINGTON, D.C. WHO MAKES THE FORMAL DETERMINATION.

Q. WHAT TYPE OF SITES ARE ELIGIBLE?

A. MANY DIFFERENT TYPES OF SITES ARE INCLUDED IN THAT NATIONAL REGISTER OF HISTORIC PLACES. ARCHAEOLOGICAL SITES, MONUMENTS, BATTLE FIELDS, SHIPWRECKS, INDIAN MOUNDS, A WIDE VARIETY OF PROPERTIES.

Q. AND WHAT IS THE EFFECT OF A DESIGNATION ON THE NATIONAL REGISTER OF HISTORIC PLACES?

A. WELL, IT CONFERS ON THE SITE OR ON THE PROPERTY THE DESIGNATION THAT IT IS SIGNIFICANT TO THE PEOPLE OF THE UNITED STATES, THAT IT IS – HAS CONTAINED VALUES WHICH ARE SIGNIFICANT TO THE PATRIMONY OF THE PEOPLE.

[p. 30] Q. DOES IT FORBID ANY CHANGES, OR ADDITIONS, OR REMODELING, OR SALVAGE OF A SITE?

A. NO, IT DOES NOT.

IT DOES STIPULATE UPON INCLUSION THAT CERTAIN FORMAL PROCESSES NEED TO BE FOLLOWED IN ANY ACTIVITIES WHICH ARE FEDERALLY FUNDED WHICH MAY DISTURB THE SITE, AND THE SAME IS TRUE ON THE STATE LEVEL REGARDING CEQA.

Q. IN YOUR OCCUPATION WITH THE STATE, WHERE DO YOU FIT IN TO THIS NOMINATING PROCESS TO GET SOMETHING ON THE NATIONAL REGISTER OF HISTORIC PLACES?

A. I FREQUENTLY ASSIST THE STATE OFFICE OF HISTORIC PRESERVATION IN ASSESSING THE . . . THE NATIONAL REGISTER PACKAGES WHICH ARE SUBMITTED, PARTICULARLY THOSE WHICH CONTAIN INFORMATION ON SHIPWRECKS AND MARITIME HISTORY.

Q. ALL RIGHT.

HAVE YOU EVER PARTICIPATED IN THE NOMINATION OF A VESSEL YOURSELF FOR INCLUSION?

A. YES, SIR.

Q. AND WHAT VESSEL WAS THAT?

A. A VESSEL CALLED THE J STREET WRECK. WE NOW KNOW IT TO BE THE STERLING, A GOLD RUSH PERIOD SHIP SUNK IN THE SACRAMENTO RIVER AT THE FOOT OF J STREET.

Q. WHEN DID YOU DO THIS PROCESS; HOW LONG AGO?

A. 1986.

Q. WHAT GOLD – OTHER, BESIDE THE J STREET VESSEL, GOLD [p. 31] RUSH –

THE COURT: LET ME JUST ASK ONE THING. YOU SAID YOU DID IT THEN IN 1986, WHAT DID YOU DO?

THE WITNESS: PREPARED A PACKAGE CONTAINING ALL THE DOCUMENTATION ON THE SHIPWRECK THAT WE WERE ABLE TO ACCUMULATE FROM HISTORICAL RESEARCH, AND DIVING, AND MEASURING, AND MAPPING, AND SO ON.

THE COURT: AND YOU SENT THAT ONTO WHAT OFFICE?

THE WITNESS: THE STATE OFFICE OF HISTORIC PRESERVATION IN SACRAMENTO.

THE COURT: IS THAT THE OFFICE THAT ACTUALLY AGREES OR DOESN'T AGREE THAT IT SHOULD BE FORMALLY NOMINATED?

THE WITNESS: YES.

THE COURT: AND HAS ANY ACTION BEEN TAKEN ON THAT?

THE WITNESS: YES. THAT – THAT WRECK IS NOW INCLUDED ON THE NATIONAL REGISTER.

THE COURT: WHEN DID THAT HAPPEN?

THE WITNESS: ABOUT 1988.

THE COURT: THANK YOU.

BY MR. RUSCONI:

Q. WHAT OTHER GOLD RUSH VESSELS ARE ON THE NATIONAL REGISTER OF HISTORIC PLACES?

A. I BELIEVE THE YANKEE BLADE, THE WINDFIELD SCOTT, THE – THERE ARE SEVERAL OTHER VESSELS FROM THE SAN FRANCISCO WATERFRONT WHICH ARE INCLUDED IN ADDITION TO THE STERLING, THE [p. 32] SACRAMENTO SHIPWRECK.

Q. IS THE TENNESSEE ON THE LIST?

A. YES, I AM SORRY. YES, THE SS TENNESSEE IS ALSO INCLUDED. YES, SIR.

Q. AND THE SS LOUIS, IS THAT?

A. NO, I DON'T – I'M NOT SURE ABOUT THE LOUIS. I DON'T THINK THE LOUIS IS COMPLETE.

BUT THE OTHER THREE GOLD RUSH STEAMERS THAT HAVE BEEN DISCOVERED IN CALIFORNIA ARE INCLUDED ON THE NATIONAL REGISTER.

Q. WHERE, IF YOU HAD TO RANK THESE VESSELS, LET'S ASSUME THAT THE BROTHER JONATHAN WAS ON THE LIST, WHERE WOULD

YOU RANK THE BROTHER JONATHAN IN RELATION TO ALL THE REST OF THESE VESSELS?

THE COURT: IN REGARD TO WHAT CRITERIA OR WHAT –

MR. RUSCONI: FOR HISTORICAL SIGNIFICANCE AND FOR ELIGIBILITY FOR IT TO BE PLACED ON THE NATIONAL REGISTER.

THE COURT: ALL RIGHT.

THE WITNESS: WELL, I BELIEVE THAT THE BROTHER JONATHAN RANKS ALONG WITH THE OTHER VESSELS AS A VERY SIGNIFICANT VESSEL IN TERMS OF ITS HISTORICAL SIGNIFICANCE.

THE OTHER – THE OTHER IMPORTANT CRITERIA IN LISTING ON THE NATIONAL REGISTER IS CALLED INTEGRITY. AND THE INTEGRITY OF THE BROTHER JONATHAN IS GREATER THAN THAT OF ITS, IN MY OPINION, IS GREATER THAN THAT OF THE OTHER GOLD RUSH STEAMSHIPS THAT HAVE BEEN ALREADY LISTED ON THE REGISTER.

[p. 33] BY MR. RUSCONI:

Q. ALL RIGHT.

DO YOU HAVE AN OPINION ON WHETHER IT IS ELIGIBLE FOR LISTING ON THE NATIONAL REGISTER OF HISTORIC –

MR. ALFORD: YOUR HONOR, I OBJECT TO THAT QUESTION BASED ON RELEVANCE.

I DON'T WANT TO STRAY TOO FAR FROM THE MERITS AT THIS POINT, BUT I AM NOT SURE

THAT IS RELEVANT TO ANY OF THE STATE'S CLAIMS WHETHER OR NOT THE VESSEL IS ELIGIBLE IN MR. HERBERT'S OPINION FOR LISTING IN THE NATIONAL REGISTER.

UNDER THE ASA, THE ISSUE IS HAS THE SECRETARY OF INTERIOR MADE A FORMAL WRITTEN DETERMINATION OF ELIGIBILITY AFTER PUBLIC NOTICE.

THE COURT: WELL, LET'S JUST HEAR THIS OPINION WHILE THE WITNESS IS HERE, AND THEN WITHOUT PREJUDICE TO YOUR RIGHT TO MAKE AN ARGUMENT THAT IT SHOULD BE STRICKEN OR IT SHOULD NOT HAVE THE EVIDENTIARY SIGNIFICANCE THAT MR. RUSCONI IS OFFERING IT FOR.

MR. ALFORD: THANK YOU.

THE COURT: WE WILL HEAR IT SUBJECT TO THAT.

MR. RUSCONI: JUST IN ANSWER, YOUR HONOR, THE PUBLIC RESOURCES CODE SECTION 6313 BASES A TITLE CLAIM ON THE STATE ON ELIGIBILITY, NOT LISTING ELIGIBILITY FOR INCLUSION ON THE NATIONAL REGISTER. AND THAT IS FOR THE PURPOSE I'M OFFERING.

THE COURT: WE'LL COVER THAT LATER. YOU HAVE NOTE [p. 34] OF THAT AND WE'LL MAKE THAT MORE COMPLETE AT A LITTLE LATER TIME. BUT I'LL HEAR THE OPINION.

THE WITNESS: YES, SIR.

IN MY OPINION, THE VESSEL IS ELIGIBLE FOR LISTING ON THE NATIONAL REGISTER OF HISTORIC PLACES.

BY MR. RUSCONI:

Q. AND WHAT DO YOU BASE THAT OPINION ON?

A. MY PERSONAL KNOWLEDGE OF THE SIGNIFICANCE OF THE WRECK, ITS HISTORY, AND MY VIEWING OF THE VIDEO TAPE WHICH SHOWED THE VESSEL AND ITS SETTING, AND SO ON.

Q. AND WHAT VIDEO TAPE ARE YOU REFERRING TO?

A. A VIDEO TAPE PREPARED BY DEEP SEA RESEARCH ON THE DISCOVERY OF THE VESSEL.

Q. NOW ON THAT VIDEO TAPE DO THEY MAKE ANY REPRESENTATIONS AS TO THE HISTORICAL SIGNIFICANCE?

MR. ALFORD: OBJECTION, YOUR HONOR, IT'S HEARSAY.

THE COURT: SUSTAINED.

MR. RUSCONI: YOUR HONOR, IT'S AN ADMISSION BY A PARTY.

MR. ALFORD: YOUR HONOR, I DON'T KNOW WHO MADE ANY KIND OF AUDIO PORTION ON THAT TAPE. IT WASN'T ANY OFFICERS OR REPRESENTATIVES OF DSR.

IT'S CLEARLY NOT – THERE'S ABSOLUTELY NO EVIDENCE THAT ANYTHING SAID ON THAT

TAPE VERBALLY IS MADE BY SOMEONE OFFICIALLY AUTHORIZED TO MAKE STATEMENTS ON BEHALF OF DSR.

[p. 35] THE COURT: WHAT'S THE SOURCE OF THE RECORD? WHAT'S THE SOURCE OF THE VIDEO?

MR. ALFORD: THE VIDEO PORTION OF THE TAPE WAS MADE BY AGENTS OF DSR IN SURVEYING THE SITE.

FRANKLY, I'M NOT SURE WHO MADE THE AUDIO PORTION OF IT, BUT THERE HAS BEEN NO EVIDENCE THAT THE SPEAKER ON THE TAPE IS SOMEONE AUTHORIZED TO MAKE STATEMENTS ON BEHALF OF DSR IN ANY KIND OF CORPORATE MANAGER.

THE COURT: WHAT WE SHOULD DO, YOU'RE PROTECTED IN THAT REGARD. FOR EXAMPLE, THE PERSON IS EITHER NOT SHOWN TO BE A PERSON OF KNOWLEDGE OR FOR SOME REASON THE AUDIO PORTION IS INADMISSIBLE, THE VIDEO PORTION WOULD BE MADE ADMISSIBLE, WE WILL HEAR THIS TESTIMONY SUBJECT TO A MOTION TO STRIKE ANY PORTION OF THE WITNESS' OPINION BASED UPON THE AUDIO.

MR. ALFORD: YOUR HONOR, WITH ALL DUE RESPECT, I THINK THE ISSUE IS HEARSAY. AND THE ONLY EXCEPTION TO HEARSAY IS A PARTY ADMISSION.

OTHERWISE, HE'S CLEARLY ASKING FOR THIS GENTLEMAN TO RECOUNT A STATEMENT MADE OUTSIDE OF COURT BY SOMEONE ELSE.

IT'S ONLY ADMISSIBLE IF THERE'S SOME FOUNDATIONAL SHOWING THAT THE STATEMENT WAS MADE BY AN OFFICER OR AN AGENT AUTHORIZED TO MAKE STATEMENTS ON BEHALF OF DSR. THERE IS NO –

THE COURT: OKAY. WE EITHER HAVE THE VIDEO OR WE DON'T. I DON'T KNOW –

MR. RUSCONI: THIS VIDEO WAS SUBMITTED TO YOU –

[p. 36] THE COURT: JUST A MINUTE, PLEASE.

FIRST OF ALL, HISTORY IS HEARSAY. SO, TO THAT EXTENT WE'RE INVOLVED IN SOME DEGREE ON THE RELIANCE UPON CERTAINLY THE VIDEO WHICH WILL SHOW INDEED THE PHYSICAL CONDITION OF WHAT IS SHOWN, AND THAT IN AND OF ITSELF HAS EVIDENTIARY VALUE AS TO WHAT IS PERCEIVED ON THE VIDEO.

NOW, ON THE SPOKEN WORD, IT SEEMS TO ME THE VIDEO IS PREPARED BY SOMEONE WHO WAS PRESENT WHEN THIS WAS GOING ON. FOR EXAMPLE, THE NARRATOR SAID, WELL, WE'RE DOWN ABOUT A HUNDRED AND THIRTY FEET, OR WHATEVER HE SAID, THAT IS ADMISSIBLE BECAUSE THAT WOULD BE AN OPINION BY A PERSON, UNDER THE FEDERAL RULES, WHO IS OBSERVING SOMETHING AND RENDERING AN OPINION. SO, A PORTION OF IT MAY, A PORTION OF IT MAY NOT.

I THINK THE RECORD IS PROTECTED TO THE EXTENT THIS WITNESS IS RELYING AS A BUILDING BLOCK OF HIS OPINION ON WHAT MAY BE ULTIMATELY DEEMED TO BE INADMISSIBLE HEARSAY, WHICH WOULD THEN, TO THAT EXTENT, ADVERSELY AFFECT THAT OPINION.

SO, IT WILL BE RECEIVED ON THAT BASIS.

MR. ALFORD: THANK YOU, YOUR HONOR.

THE COURT: NOW YOU FORMED AN OPINION HAVING SEEN AND HEARD THE – A NARRATOR SAY SOMETHING PERTINENT TO THAT VIDEO; IS THAT RIGHT?

THE WITNESS: WELL, NOT JUST THE NARRATION, BUT I PERSONALLY DOVE TO OTHER –

THE COURT: WE WILL GET TO THAT. I'M JUST TALKING [p. 37] NOW ABOUT THE VIDEO.

THE WITNESS: THE VIDEO, YES.

THE COURT: THE VIDEO HAS FORMED THE BASIS FOR YOUR OPINION?

THE WITNESS: YES, SIR.

THE COURT: BOTH WHAT YOU SAW IN THE VIDEO; DO I TAKE THAT CORRECT?

THE WITNESS: YES, SIR.

THE COURT: AND ALSO WHAT YOU HEARD ON THE VIDEO?

THE WITNESS: ABSOLUTELY.

THE COURT: ALL RIGHT.

I JUST WANT TO SEPARATE THOSE TWO BECAUSE OUR RULES OF EVIDENCE MAY MAKE A DIFFERENCE IN THE EXTENT TO WHICH THE COURT CAN CONSIDER THE SEEN PORTION AS WELL AS THE LISTENED PORTION.

ALL RIGHT?

THE WITNESS: YES, SIR.

THE COURT: THERE ARE GROUND RULES, AND MR. ALFORD'S POSITION IS PROTECTED IN THAT REGARD.

MR. ALFORD: YOUR HONOR, I WOULD BEG THE COURT'S INDULGENCE TO ASK HIM ONE OR TWO VOIR DIRE QUESTIONS ABOUT THE FORMATION OF HIS OPINION AND HIS RELIANCE ON THE TAPE.

THE COURT: YOU CAN DO THAT ON CROSS-EXAMINATION.

OVERRULED.

THE COURT: WHAT IS YOUR OPINION?

[p. 38] THE WITNESS: SIR, MY OPINION IS THAT THE VESSEL IS ELIGIBLE FOR INCLUSION ON THE NATIONAL REGISTER OF HISTORIC PLACES.

THE COURT: WHAT IS THE BASIS OF THAT OPINION?

THE WITNESS: THE BASIS OF THAT OPINION IS MY . . . MY JUDGMENT OF THE HISTORICAL SIGNIFICANCE OF THE VESSEL AND ITS

INTEGRITY AND POTENTIAL TO YIELD INFORMATION IMPORTANT TO THE HISTORY OF CALIFORNIA.

THE COURT: AND WHAT IS THE SOURCE OF YOUR CONCLUSION THAT THERE IS HISTORICAL SIGNIFICANCE AND INTEGRITY AND THE OTHER ELEMENTS THAT YOU THINK MAKE IT ELIGIBLE?

THE WITNESS: MY KNOWLEDGE OF THE GOLD RUSH MARITIME HISTORY OF CALIFORNIA, AND SOME OF THE WRECK SITES THAT REPRESENT THAT HISTORY THAT HAVE BEEN DISCOVERED AND INCLUDED ON THE NATIONAL REGISTER PREVIOUSLY.

THE COURT: ALL RIGHT.

BY MR. RUSCONI:

Q. I BELIEVE THE QUESTION WHICH CAUSED THE HANGUP WAS WHETHER OR NOT HE HAD HEARD ANY OPINION OFFERED –

THE COURT: HE CAN EXCLUDE THAT FROM HIS OPINION.

MR. RUSCONI: CERTAINLY. I WAS JUST WONDERING IF HE HAD HEARD IT AND WHAT THAT OPINION WAS.

BY MR. RUSCONI:

Q. DID YOU AGREE WITH IT OR DISAGREE WITH IT?

A. I AM SORRY, I DIDN'T.

[p. 39] Q. DID YOU HEAR ON THE NARRATION OF THE TAPE AN OPINION AS TO THE HISTORIC SIGNIFICANCE?

A. YES, I BELIEVE I DID.

Q. AND WHAT WAS THE OPINION?

THE COURT: NOW, BEFORE YOU TELL US THAT, DO YOU KNOW WHO WAS SPEAKING?

THE WITNESS: THE VIDEO HAS A NARRATOR. I DON'T REMEMBER –

THE COURT: WELL, DO YOU KNOW IF THE PERSON IS QUALIFIED TO GIVE THE INFORMATION –

THE WITNESS: NO, I DON'T.

THE COURT: WELL, I THINK WE WILL EXCLUDE THAT FROM HIS OPINION, ANY REFERENCE TO THE AUDIO.

MR. ALFORD: THANK YOU, YOUR HONOR. MR. RUSCONI: ALL RIGHT.

BY MR. RUSCONI:

Q. NOW ON THE VIDEO PORTION, DID YOU OBSERVE THE HULL OF THE VESSEL?

A. YES, SIR.

Q. AND APPROXIMATELY WHERE DID THE SEABED MEET THE HULL OF THE VESSEL?

A. THE HULL OF THE VESSEL IS BURIED UP TO THE LEVEL OF COPPER SHEATHING WHICH COVERED THE ORIGINAL HULL OF THE VESSEL.

COPPER SHEATHING WAS THE METHOD USED DURING THE MID 19TH CENTURY OF PROTECTING WOODEN SHIPS FROM THE BORE [p. 40] ORGANISMS, AND SO ON THAT ATTACKED WOOD. AND THAT COPPER SHEATHING IS – COVERS THE HULL UP TO THE WATER LINE OR IN SOME CASES UP TO THE FIRST DECK LEVEL OF THE VESSEL.

IN THE VIDEO, YOU CAN CLEARLY SEE THAT THE COPPER SHEATHING IS EXPOSED JUST ABOVE THE SEABED, BUT THAT MEANS THAT A SIGNIFICANT AMOUNT OF THE HULL IS ACTUALLY BURIED IN THE SEABED ITSELF.

Q. ALL RIGHT.

WHAT IS THE BASIS OF YOUR STATEMENT THAT THE COPPER SHEATHING WENT UP THE SIDE OF THE HULL TO THE WATER LINE OR MAYBE A LITTLE ABOVE?

A. MY EXAMINATION OF A NUMBER OF GOLD RUSH AND MID 19TH CENTURY VESSELS FROM CALIFORNIA, INCLUDING THE STERLING, THE GOLD RUSH SHIP FROM THE SACRAMENTO RIVER.

Q. YOU STATED THAT YOU HAD DIVED ON SOME HISTORIC VESSELS?

A. YES, SIR.

Q. AND WHICH VESSELS WERE THOSE?

A. I DOVE ON THE WINDFIELD SCOTT FROM MIDDLE ANACAPA ISLAND (PHONETIC). I HAVE EXAMINED THE TENNESSEE, WHICH IS IN THE

INTERTIDAL ZONE AND ON THE BEACH IN TENNESSEE COVE IN MARIN COUNTY.

I'VE DOVE ON THE FROLIC, THE 1850 SHIPWRECK IN MENDOCINO COUNTY, AND A NUMBER OF OTHER VESSELS.

Q. ALL RIGHT.

MR. RUSCONI: THAT COMPLETES MY DIRECT EXAMINATION, [p. 41] YOUR HONOR.

THE COURT: VERY WELL, CROSS-EXAMINE, MR. ALFORD.

CROSS-EXAMINATION

BY MR. ALFORD:

Q. MR. FOSTER, YOU SAID THAT YOU LEARNED OF THE BROTHER JONATHAN FOR THE FIRST TIME APPROXIMATELY FIFTEEN YEARS AGO?

A. I'D SAY SO, YES, SIR.

Q. SO THAT WOULD HAVE BEEN ROUGHLY IN 1979?

A. SOMETHING LIKE THAT, YES, SIR.

Q. HOW LONG HAVE YOU BEEN ACTIVE AS AN ARCHAEOLOGIST IN CALIFORNIA?

A. SINCE 1966, INCLUDING MY STUDENT YEARS.

Q. HAS THE STATE OF CALIFORNIA NOMINATED THE BROTHER JONATHAN FOR INCLUSION ON THE NATIONAL REGISTER OF HISTORIC PLACES?

A. NO, SIR.

Q. OKAY.

YOU SAID THAT THE COPPER SHEATHING ON THE HULL OF THE VESSEL APPEARED TO BE BURIED IN THE SEA FLOOR?

A. YES, SIR.

Q. DO YOU HAVE ANY OPINION AS TO WHETHER OR NOT – I AM SORRY, LET ME BACK UP.

HAVE YOU EVER HAD ANY EXPERIENCE IN SALVAGING VESSELS, SHIPWRECKED VESSELS?

A. I HAVE HAD EXPERIENCE DOING ARCHAEOLOGY ON SUBMERGED SHIPWRECKS, YES, SIR.

[p. 42] Q. COULD YOU DETERMINE FROM THE VIDEO TAPE WHAT KIND OF TOOLS OF EXCAVATION, IF ANY, WOULD BE REQUIRED TO EXCAVATE THE BROTHER JONATHAN?

A. YES, SIR. I BELIEVE THE STANDARD TOOLS WOULD BE REQUIRED TO EXCAVATE THE BROTHER JONATHAN. THAT IS AN AIRLIFT OR A DREDGE.

Q. COULD YOU DETERMINE FROM YOUR VIEW OF THE VIDEO THE SOLIDITY OR LACK THEREOF OF THE SEDIMENT AROUND THE VESSEL?

A. THERE IS A – THERE'S A LAYER OF LOOSE SEDIMENT, IT APPEARS, IN THE VIDEO THAT IS DISTURBED WHEN THE ROV IS CRUISING AROUND ON THE SITE ITSELF.

Q. AND THAT LOOSE SEDIMENT WAS SIMPLY BEING DISTURBED BY THE PROPULSION OF THE VEHICLE; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND IF THAT SEDIMENT WAS ABLE TO BE DISTURBED BY THE PROPULSION OF THE VEHICLE IT COULD BE DISTURBED PRESUMABLY JUST BY A DIVER WIPING HIS HAND ALONG THOSE PORTIONS OF THE VESSEL AS WELL?

A. THAT'S RIGHT.

THE VERY UPPER TOP LEVEL OF THE SEDIMENT COULD BE DISTURBED THAT WAY. YES, SIR.

Q. YOU HAVEN'T DONE ANY TESTING ON THE SEA FLOOR IN THE AREA OF THE BROTHER JONATHAN?

A. NO, SIR.

Q. SO YOU DON'T KNOW THE EXTENT TO WHICH HARDER SEDIMENT [p. 43] MIGHT BE FOUND UNDERNEATH THE LOOSE SEDIMENT?

A. NO, SIR.

MR. ALFORD: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. RUSCONI: JUST A COUPLE, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. RUSCONI:

Q. FROM YOUR KNOWLEDGE OF THE SIZE OF THE VESSEL AND THE ERA IN WHICH IT WAS BUILT, APPROXIMATELY HOW MANY FEET UP THE – FROM THE KEEL TO THE POINT WHERE YOU SEE THE COPPER SHEATHING DO YOU THINK WOULD BE BENEATH WHAT IS NOW THE BED?

MR. ALFORD: OBJECTION, YOUR HONOR. THERE HAS BEEN NO SHOWING THAT THIS WITNESS KNOWS THE DIMENSIONS.

THE COURT: I WILL SUSTAIN THAT OBJECTION. IT WOULD JUST BE A GUESS UNLESS HE HAS CONSIDERABLE KNOWLEDGE ABOUT SHIPBUILDING OF THIS CLASS AND TYPE IN THAT ERA.

I'LL ACCEPT HIS TESTIMONY THAT HE LOOKED AT THIS AND HE COMPARED IT TO OTHERS, BUT AN OPINION AS TO HOW MANY FEET THE COPPER GOES DOWN –

MR. RUSCONI: ALL RIGHT, YOUR HONOR. I DON'T HAVE ANY FURTHER QUESTIONS.

THE COURT: LET ME JUST ASK YOU ONE QUESTION.

ON THE BROTHER JONATHAN, YOU SAID YOU BEGAN TO WORK IN 1979, BECAME INTERESTED IN IT?

[p. 44] THE WITNESS: YES, SIR.

THE COURT: AND HAVE YOU PREPARED OR ARE YOU PREPARING A SUBMISSION FOR THE REGISTRATION?

THE WITNESS: WE ARE PREPARING A SUBMISSION FOR A PACKAGE OF A NUMBER OF DIFFERENT PROPERTIES FOR INCLUSION ON THE NATIONAL HISTORIC LANDMARK LISTING FOR – SO THAT WE ARE TRYING TO INCLUDE ALL OF THE GOLD RUSH PERIOD SHIPWRECKS FROM CALIFORNIA.

THE COURT: I KNOW THAT'S A GENERAL GOAL, BUT I GUESS I'M INTERESTED IN WHAT HAVE YOU ASSEMBLED THAT YOU COULD PRESENT TO SOMEBODY WHICH IS THE ACCUMULATION OF THE NECESSARY DATA SPECIFICALLY FOR THE BROTHER JONATHAN?

THE WITNESS: ONLY THE HISTORICAL PART OF THE STORY OF THE BROTHER JONATHAN AND ITS HISTORICAL SIGNIFICANCE.

WE HAD NO INFORMATION ON ITS LOCATION OR CONDITION.

THE COURT: AND WHEN WAS THAT DONE, THAT HISTORICAL SUMMARY?

THE WITNESS: 1983 OR THEREABOUTS.

THE COURT: AND SINCE '83 UNTIL NOW, WHAT HAS BEEN DONE?

THE WITNESS: NOTHING, SIR.

THE COURT: THANK YOU.

ANYTHING FURTHER?

MR. RUSCONI: NOTHING.

THE COURT: YOU MAY STEP DOWN. THANK YOU.

[p. 45] MR. RUSCONI: YOUR HONOR, THAT CONCLUDES MY WITNESSES.

THE COURT: ALL RIGHT. MR. ALFORD?

MR. ALFORD: YOUR HONOR, MAY WE HAVE A VERY BRIEF RECESS?

THE COURT: OH, SURE. TAKE A TEN-MINUTE RECESS. THANK YOU.

(RECESS TAKEN.)

THE COURT: ALL RIGHT. MR. ALFORD?

MR. RUSCONI: YOUR HONOR, PRIOR TO MR. ALFORD, I WOULD BEG THE COURT'S INDULGENCE TO RECALL MR. FOSTER FOR ONE OR TWO QUESTIONS. AND IT GOES TO THE REASON WHY THE STATE HAS NOT SUBMITTED THE PACKAGE ON THE BROTHER JONATHAN.

MR. ALFORD: YOUR HONOR, I WOULD OBJECT. HE'S RESTED. THAT ISSUE IS NOT HARDLY A SURPRISE. WE HAVE COVERED IT PRETTY THOROUGHLY. I DON'T KNOW IF WE NEED TO GO –

THE COURT: I THINK WHAT WE WILL DO, I'LL MAKE SURE THE RECORD NOTES THAT HE DID REST, AND WE'VE HAD A RECESS, AND NOW HE'S ASKED TO RECALL A WITNESS. I SUPPOSE YOU DISCUSSED IT WITH THE WITNESS; IS THAT RIGHT?

MR. RUSCONI: THAT'S CORRECT.

THE COURT: AND I WILL LET HIM PUT IT ON, AND LET'S HEAR WHAT HE SAYS.

MR. ALFORD: THANK YOU, YOUR HONOR.

JOHN W. FOSTER. PLAINTIFF'S WITNESS, RECALLED

[p. 46] THE CLERK: YOU'RE STILL UNDER OATH, MR. FOSTER.

THE WITNESS: THANK YOU.

DIRECT EXAMINATION

BY MR. RUSCONI:

Q. MR. FOSTER, IS THE PRECISE LOCATION OF A VESSEL SUCH AS THE BROTHER JONATHAN A PREREQUISITE TO SUBMISSION OF THE PACKAGE FOR PLACEMENT ON THE NATIONAL REGISTER OF HISTORIC PLACES?

A. YES, SIR, IT IS.

Q. AND WHAT IS THE REASON WHY THE STATE, EVEN THOUGH IT BEGAN THIS IN 1983, HAS NOT SUBMITTED THE NOMINATION OF THE BROTHER JONATHAN?

A. THE PACKAGE COULD NOT BE COMPLETED BECAUSE THE LOCATION WAS NOT KNOWN.

THE COURT: WHY NOT?

THE WITNESS: WELL –

THE COURT: IT HAS BEEN TEN YEARS. WHAT HAS THE STATE DONE TO DETERMINE ITS LOCATION?

THE WITNESS: WE HAVE NOT CARRIED OUT THE RESEARCH TO DETERMINE THE LOCATION.

THE COURT: I KNOW YOU HAVEN'T. I GUESS I'M ASKING WHY HAVEN'T YOU IF IT'S OF SUCH HISTORICAL SIGNIFICANCE, WHY?

MAYBE YOU DON'T KNOW. IF YOU KNOW, I WOULD LIKE TO KNOW WHY.

THE WITNESS: I DON'T KNOW WHY. I AM SORRY.

[p. 47] THE COURT: ALL RIGHT.

ANYTHING FURTHER?

MR. RUSCONI: NO, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN – ANYTHING FURTHER MR. ALFORD?

MR. ALFORD: NO.

THE COURT: YOU MAY STEP DOWN. THANK YOU.

THE WITNESS: THANK YOU.

THE COURT: WHEN WAS THE MOTION TO INTERVENE FILED HERE; DO YOU KNOW THAT FROM THE RECORDS?

MR. ALFORD: IT WAS FILED APPROXIMATELY TWO YEARS AGO, YOUR HONOR.

THE COURT: IT HAS A PRECISE DATE. IT'S ON THE DOCKET, I JUST DIDN'T – ABOUT TWO YEARS AGO?

MR. ALFORD: SEVERAL YEARS AGO, AT LEAST.

THE COURT: ALL RIGHT. THANK YOU.

MR. RUSCONI: I WOULD THINK TWO.

THE COURT: I GUESS, IT'S A MATTER THAT CAN BE RENDERED CERTAIN, OF COURSE.

OKAY. MR. ALFORD?

MR. ALFORD: YOUR HONOR, WE WOULD REST ON THE DECLARATIONS THAT WE HAVE SUBMITTED ON THE ISSUES OF ABANDONMENT, THE DECLARATION SHOWING INSURANCE COMPANIES PAID THE LOSS FOR THE CLAIMS OF THE VESSEL, THEY ASSIGNED THE TITLE TO US, AND THE DECLARATIONS FROM DR. BASCOM AND SALVAGE [p. 48] EXPERTS –

THE COURT: SPEAK UP SO SHE CAN HEAR YOU. SHE HAS TO GET IT ALL DOWN.

MR. ALFORD: THE DECLARATION FROM DR. BASCOM AND THE SALVAGE EXPERTS SAYING THAT THEY HAVE SEEN THE VESSEL AND IN THEIR OPINION IT'S NOT EMBEDDED, WE WOULD REST ON THOSE DECLARATIONS.

THE COURT: ALL RIGHT. THEN THE PLAINTIFF OPPOSING THIS MOTION IS OFFERED THE PREVIOUS OFFERS AND RESTED BASED UPON THAT EVIDENCE INCLUDING THE VIDEO; IS THAT RIGHT?

MR. ALFORD: THAT'S RIGHT, YOUR HONOR.

THE COURT: LET ME ASK ABOUT THE VIDEO BECAUSE I WANT TO OBVIOUSLY LOOK AT IT.

I'M INCLINED TO BELIEVE THAT I PROBABLY SHOULDN'T LISTEN TO THE AUDIO, JUST LOOK AT THE VIDEO, AND THEN TRY TO RELATE THAT TO THE DECLARATIONS UNDER OATH AS WELL AS THE TESTIMONY; IS THAT A FAIR WAY FOR ME TO APPROACH THAT?

MR. ALFORD: EXACTLY, YOUR HONOR.

IN FACT, I APOLOGIZE TO THE COURT, IT WAS A TECHNICAL ERROR. I INSTRUCTED MY VIDEO TECHNICIAN TO REMOVE THE AUDIO PORTION BEFORE IT WAS SUBMITTED TO THE COURT. APPARENTLY THAT HAS NOT BEEN DONE, BUT I APOLOGIZE.

AND THE COURT'S APPROACH WOULD BE GOOD, NOT TO CONSIDER THE AUDIO PORTION.

JUST VERY BRIEFLY, ALTHOUGH WE DON'T WISH TO PUT ON [p. 49] ANY FURTHER EVIDENCE TODAY, WE WOULD LIKE BRIEF LEGAL ARGUMENT.

THE COURT: OH, YES, I WANT TO HEAR BOTH SIDES GIVE SOME BRIEF LEGAL ARGUMENT. WE HAVE THE RECORD AND EVIDENCE HERE, I WOULD LIKE TO HEAR FROM BOTH SIDES WHAT YOUR POSITION IS.

COULD YOU DID [sic] DO THAT, MR. RUSCONI?

MR. RUSCONI: CERTAINLY, YOUR HONOR.

MR. RUSCONI: YOUR HONOR, WE HAVE HAD EXTENSIVE BRIEFING AND I'M NOT GOING TO TAKE A LOT OF TIME.

IT'S THE POSITION OF THE STATE OF CALIFORNIA THAT IN ORDER TO HAVE A CLAIM OF THE ELEVENTH AMENDMENT IMMUNITY SUSTAINED IN THIS ACTION WHICH WOULD LEAD TO THE DISMISSAL OF THE ENTIRE ACTION BECAUSE WE ARE AN INDISPENSABLE PARTY WE ONLY NEED TO SHOW A COLORABLE CLAIM.

NOW, THE CASES, IN PARTICULAR THE *MARITIME UNDERWATER SURVEYS* CASE AND THE *MARX* CASE OUT OF GUAM DECIDED IN THE NINTH CIRCUIT SEEM TO ME TO MAKE IT CLEAR THAT IF THE VESSEL IS ON STATE LANDS, WHICH THE PARTIES HAVE STIPULATED IN THIS CASE, AND IF THE STATE HAS, IN EFFECT, ANY CLAIM ON THE VESSEL WHICH WE DO HERE THROUGH PUBLIC RESOURCES CODE 6309 AND PUBLIC RESOURCES CODE 6313, BOTH THE POLICE POWER CLAIM AND TITLE CLAIM, THAT THAT ENDS THE COURT'S INQUIRY, AND THE MOTION TO DISMISS SHOULD BE GRANTED.

WE ALSO FEEL THAT THE ABANDONED SHIPWRECK ACT TAKES [p. 50] JURISDICTION FROM THE COURT TO THOSE VESSELS APPLICABLE HERE THAT ARE ELIGIBLE FOR INCLUSION ON THE NATIONAL REGISTER OF HISTORIC PLACES.

I BELIEVE THAT GIVEN THE TIME CONSTRAINTS THAT WE HAVE BEEN WORKING UNDER, I HAVE TRIED TO BE [sic] BRING AS

MUCH EVIDENCE FORWARD AS I CAN TO ASSURE THE COLORABILITY OF THE STATE'S CLAIM, BOTH AS TO THE FACT THAT IT'S A WRECK OF GREAT HISTORICAL SIGNIFICANCE AND WHICH IS CERTAINLY ELIGIBLE GIVEN THE SHIPS THAT HAVE BEEN PLACED ON THE LIST, IT'S ON STATE LAND.

IF YOU REMEMBER THE STATE STATUTE 6313 SAYS THAT ABANDONMENT IS PRESUMED AFTER FIFTY YEARS. IT'S BEEN A HUNDRED AND FORTY, HUNDRED AND FIFTY YEARS. WE BELIEVE IT'S ELIGIBLE FOR INCLUSION ON THE NATIONAL REGISTER OF HISTORIC PLACES.

AND I BELIEVE WE HAVE BROUGHT FORWARD SOME EVIDENCE THAT IT'S ALSO EMBEDDED. WE HAVEN'T BEEN ABLE TO GO DOWN AND EXAMINE IT OURSELVES, BUT FROM THE VIDEO, MR. FOSTER SEEMED TO THINK THAT AT LEAST IT WAS EMBEDDED UP TO ITS COPPER PLATING.

THIS IS A CASE OF GREAT IMPORTANCE TO THE STATE. IF THE MOTION IS GRANTED, IT DOES NOT END THE REMEDIES THAT THE DEEP SEA RESEARCH HAVE. THEY CAN ASK FOR A PERMIT FROM THE STATE LANDS COMMISSION, CAN CHALLENGE THE STATE STATUTES IN STATE COURT, WHICH IS THE PROPER PLACE FOR THE CHALLENGING OF THOSE STATUTES PRIOR TO TAKING THEM UP FARTHER, IF THEY WISH [p. 51] IN THE FEDERAL SYSTEM.

AND I RESPECTFULLY ASK THE COURT TO GRANT OUR MOTION, AND DISMISS THIS CASE IN ITS ENTIRETY.

THE COURT: ALL RIGHT.

ON THAT LAST POINT, LET ME ASK YOU THIS: IF THE CASE IS DISMISSED HERE ON THE COLORABLE CLAIM NOTION, WHERE – WHAT FORM THEN TAKES UP THE BALANCE OF THAT WHICH IS IN DEED THE STATE – WHAT DOES THE STATE HAVE TO, IN FACT, PROVE IT'S ENTITLED TO THE PROPERTY AS OPPOSED TO JUST A COLORABLE CLAIM THAT TELLS US WHERE IT'S GOING TO BE DECIDED?

MR. RUSCONI: SUPERIOR COURT OF THE STATE OF CALIFORNIA BASED UPON THE PUBLIC RESOURCES CODE SECTIONS.

THE COURT: AND CAN THE PLAINTIFF MAKE A CLAIM AGAINST THE STATE OF CALIFORNIA IN STATE COURT CLAIMING TITLE TO THIS?

MR. RUSCONI: I WOULD THINK THAT UNDER STATE LAW, THE PROPER VEHICLE WOULD BE TO REQUEST A PERMIT, SALVAGE PERMIT FROM THE STATE LANDS COMMISSION. AND THEN UPON EITHER ITS DENIAL OR APPROVAL WITH CONDITIONS, CHALLENGE THAT THOSE CONDITIONS OR THE DENIAL, WHICH WOULD THEN LEAD TO THE CHALLENGE TO THE UNDERLYING STATUTES UPON WHICH THE STATE LANDS COMMISSION OPERATES 6309 AND 6313.

THE COURT: WELL, I GUESS WHAT I – CAN THE PLAINTIFF CLAIM IN THE CALIFORNIA COURT, STATE COURT NOT THROUGH THE PERMIT ROUTE, BUT JUST CLAIM TITLE TO THIS [p. 52] PROPERTY AND SUE THE STATE?

MR. RUSCONI: YES, I WOULD THINK THEY CAN BRING – BY A TITLE ACTION.

THE COURT: AND THE STATE IS NOT IMMUNE?

MR. RUSCONI: THAT I'M NOT – I'M NOT – YOUR HONOR, I'M TRYING TO THINK ON MY FEET HERE ABOUT EXACTLY WHAT REMEDY THEY WOULD HAVE.

THE COURT: IN OTHER WORDS, THE PARTY SAYING – WHAT IF A PARTY SAYS, I DON'T WANT TO SALVAGE, I JUST WANT TITLE SETTLED HERE.

AND THE STATE HAS ADVANCED EVIDENCE OF A COLORABLE CLAIM IN THE FEDERAL COURT, BASED UPON THAT AND THE ELEVENTH AMENDMENT REMOVED IT OR DISMISSED IT. THAT'S ALL RIGHT. I NOW WANT TO GO INTO STATE COURT, AND I WANT THE SAME REMEDY OPPORTUNITY IN STATE COURT, WHICH IS THE APPLICATION OF ADMIRALTY LAW IN STATE COURT, NOT PERMIT LAW, BUT ADMIRALTY LAW.

I GUESS I HAVE TO KNOW IF IT IS DISMISSED HERE, DOES THE STATE SHUT ITS DOOR TO THE PLAINTIFF'S CLAIM IN STATE COURT, BECAUSE THEN WHERE DOES THE PLAINTIFF GO IN THAT SENSE.

MR. RUSCONI: I KNOW THAT IF THEY GO THROUGH THE PERMIT ROUTE, NO, THAT WOULD NOT SHUT THE DOOR.

OTHER THAN THE PERMIT ROUTE, I WOULD LIKE TO DO SOME RESEARCH AND ANSWER THAT FOR YOU.

THE COURT: THAT WOULD BE SOMETHING THAT MAYBE [p. 53] SHOULD BE PART OF OUR OVERALL REVIEW OF THIS, THAT IS, THE QUESTION IS, IF THERE WOULD BE EVIDENCE OF A COLORABLE CLAIM, WHICH ISN'T YET AN ULTIMATE JUDGMENT SETTING FORTH TITLE IN THE STATE, BUT JUST THAT'S A VEHICLE TO GET IT OUT OF THE FEDERAL COURT BECAUSE OF THE ELEVENTH AMENDMENT AND INTO STATE COURT, THE QUESTION IS CAN A CLAIMANT GO INTO STATE COURT, NAME THE STATE OF CALIFORNIA AS A DEFENDANT, SECURE TITLE, NOT ONLY AGAINST THAT DEFENDANT BUT AGAINST ALL THE OTHER CLAIMANTS AND PARTIES THAT THAT PLAINTIFF SEEKS TO GET PROTECTION FROM IN FEDERAL COURT HERE, UNDER THE APPLICATION OF ADMIRALTY LAW?

THERE MIGHT BE SOME OTHER FEATURES OF THAT QUESTION THAT MAY BE SUGGESTED BY THE QUESTION, BUT I'LL ASK MR. ALFORD THAT IN A MINUTE AS WELL.

MR. RUSCONI: I KNOW ALSO OF ANOTHER AVENUE FOR THEM IF THEY WERE TO GO OUT THERE AND ATTEMPT TO SALVAGE, WE WOULD BE FORCED TO BRING AN INJUNCTIVE ACTION AGAINST THEM, WHICH WOULD THEN LEAD TO THE QUESTION OF TITLE, OR TO BACK OFF.

THE COURT: OKAY, FINE. I UNDERSTAND THAT.

IN OTHER WORDS, THE STATE CLAIMANT HAS A RIGHT TO, IN REGARD TO REGULATION

AND ASSURING THE ENVIRONMENT IS NOT DAMAGED, BY SALVAGE ACTIVITIES AND ALL THE THINGS THAT GO WITH THAT REGULATION OF THE CONDUCT OF A WRECK LIKE THIS, I DON'T THINK ANYBODY QUARRELS WITH THAT, I'M JUST NARROWING THIS TO –

[p. 54] MR. RUSCONI: TO THE TITLE.

THE COURT: – TWO THINGS, THE TITLE AND THE PERMIT ROUTE THOUGH ISN'T GOING TO BLOCK OUT THE WORLD IN TERMS OF THE PLAINTIFF'S CLAIM. THAT MIGHT JUST SETTLE BETWEEN THE STATE AND THE PLAINTIFFS, MAYBE, MAYBE NOT, BUT THAT ISN'T GOING TO BLOCK OUT IN THE TRADITIONAL ADMIRALTY SENSE A CLAIMANT TO A WRECK WHO WANTS THE PROCEDURE THAT WILL FOR ALL TIME SETTLE THE CLAIM AGAINST THE WORLD INCLUDING THE ELEVENTH AMENDMENT PROTECTIVE STATES.

THAT'S JUST ONE FEATURE. IF I CAN JUST GET, I DON'T WANT A LENGTHY BRIEF, BUT SOMETHING RIGHT TO THE POINT ON THAT OR ANYTHING THAT YOU THINK WOULD BE PERTINENT TO THAT QUESTION THAT I HAVEN'T COVERED.

ALL RIGHT?

MR. RUSCONI: CERTAINLY.

THE COURT: MR. ALFORD?

MR. ALFORD: I WILL TRY TO KEEP MY COMMENTS AS BRIEF AS POSSIBLE.

THE COURT: YES, I KNOW WE HAVE YOUR PRINCIPAL ARGUMENTS, YOU DON'T HAVE TO REPEAT THEM AND YOU SHOULDN'T FEEL AS THOUGH BY FAILING TO DO SO THE COURT THINKS YOU ARE NOT SERIOUS ABOUT THIS.

YOU CAN SUPPLEMENT WHAT YOU HAVE TOLD US OR ANYTHING YOU WANT TO ADD AT THIS TIME.

MR. ALFORD: THANK YOU VERY MUCH, YOUR HONOR. I [p. 55] CERTAINLY APPRECIATE THE COURT'S PATIENCE THROUGHOUT THIS MATTER.

FIRST, I THINK WE NEED TO START WITH THE FUNDAMENTAL ISSUE OF DOES THE COURT HAVE JURISDICTION HERE. THERE IS A CHALLENGE TO JURISDICTION, OR THE STATE PURPORTED THAT ITS MOTION WAS A CHALLENGE TO JURISDICTION. I THINK IT'S IMPORTANT TO UNDERSTAND THAT IT'S REALLY NOT.

I MEAN, THE NINTH CIRCUIT DEFINITIVELY DECIDED THAT ISSUE IN A RECENT CASE *ITSI TV PRODUCTIONS*. THAT'S AT 3 F.3D 1289. WHAT THE NINTH CIRCUIT SAID THERE IS THAT ELEVENTH AMENDMENT CLAIM IS NOT AN [sic] CHALLENGE TO THE COURT'S JURISDICTION. IT DOES NOT DIVEST THE COURT OF JURISDICTION EVEN WHERE THE ELEVENTH AMENDMENT APPLIES. AND IT'S AN AFFIRMATIVE DEFENSE, THE COURT EXPLAINED THERE, THE NINTH CIRCUIT.

AND THE IMPORTANCE OF MAKING THAT DISTINCTION IS VERY REAL. IT'S MORE THAN SEMANTIC.

THE DISTINCTION AFFECTS THE BURDEN OF PROOF. AND WHAT THE NINTH CIRCUIT WENT ON TO SAY IS THAT LIKE ANY OTHER AFFIRMATIVE DEFENSE, THE ELEVENTH AMENDMENT ISSUE HAS TO BE PROVEN BY THE STATE BY A PREPONDERANCE OF THE EVIDENCE.

THE STATE BEARS THE BURDEN ON THAT ISSUE. IT BEARS THE BURDEN OF PROVING ALL FACTS REQUIRED TO ESTABLISH ITS ELEVENTH AMENDMENT AFFIRMATIVE DEFENSE.

AND I THINK IT'S PRETTY CLEAR THE STATE HAS NOT BORN [p. 56] THAT BURDEN HERE. THERE HAS BEEN A LOT OF TALK ABOUT COLORABILITY, BUT I THINK THE NINTH CIRCUIT WAS CLEAR IN *ITSI PRODUCTION* CASE IN SAYING THAT THE STATE HAS THE BURDEN OF PROVING ALL FACTS TO SUPPORT ITS ELEVENTH AMENDMENT ASSERTION OF IMMUNITY BY A PREPONDERANCE OF THE EVIDENCE.

IF YOU LOOK AT THE CASES THAT THE STATE OF CALIFORNIA HAS CITED ON THE COLORABILITY ISSUE, NONE OF THOSE CASES SAID THAT THE STATE ONLY BEARS THE BURDEN OF SHOWING THE FACTS ON A COLORABLE BASIS.

IT'S THE CLAIM THAT IS COLORABLE OR NOT COLORABLE, BUT THE BURDEN OF PROVING THE FACTS UNDERLYING THE CLAIM IS BY A PREPONDERANCE OF THE EVIDENCE. NONE OF THE CASES SAY THAT THE BURDEN OF PROVING THE FACTS IS SIMPLY COLORABLE.

THE VESSEL IS EITHER EMBEDDED OR IT'S NOT EMBEDDED. IT'S EITHER ABANDONED OR

IT'S NOT ABANDONED. THE STATE HAS THE BURDEN OF PROVING THOSE ISSUES BY A PREPONDERANCE OF THE EVIDENCE BECAUSE IT IS AN AFFIRMATIVE DEFENSE.

NOW, THOSE FACTS MAY GIVE RISE TO A COLORABLE CLAIM, BUT THAT'S A DIFFERENT ISSUE. THE BURDEN OF PROVING THE FACTS IS BY A PREPONDERANCE OF THE EVIDENCE.

AND IF YOU LOOK AT THOSE CASES THAT ARE CITED BY THE STATE, THE INTERESTING THING, AND STRIKING THING REALLY IS THAT IN ALL OF THEM, THE COURT FOUND ESSENTIALLY AS AN UNDISPUTED FACT THAT THE VESSEL WAS LOCATED IN STATE WATERS, THAT IT WAS EMBEDDED IN SEA FLOOR, AND THAT IT WAS ABANDONED.

[p. 57] NONE OF THOSE CASES STAND FOR THE PROPOSITION THAT THE COURT ONLY – THAT THE STATE ONLY BEARS THE BURDEN OF PROVING THOSE ISSUES ON A COLORABLE BASIS. THEY HAVE TO BE PROVED BY A PREPONDERANCE OF THE EVIDENCE.

SO I THINK WE HAVE TO START WITH THE ABANDONED SHIPWRECK ACT, AND THE QUESTION IS DOES IT APPLY HERE.

AND THERE ARE ESSENTIALLY THREE ELEMENTS. THE FIRST AND FOREMOST IS THAT THE VESSEL HAS TO ABANDONED. AND CASE LAW IS CLEAR THAT WHEN YOU HAVE A VESSEL THAT WAS TAKEN FROM THE ORIGINAL OWNERS BY FORCE OF NATURE, VIOLENTLY AGAINST THEIR WILL, THE CASE LAW SAYS WE'RE GOING TO REQUIRE VERY STRONG SHOWING SOME KIND

OF AN AFFIRMATIVE ACT TO SHOW ABANDONMENT. AN AFFIRMATIVE ACT.

THIS IS NOT A CASE WHERE THE OWNERS DUMPED THE VESSEL OUT THERE BECAUSE THEY DIDN'T WANT IT ANYMORE, IT WAS TAKEN AWAY FROM THEM. THERE HAS TO BE SOME AFFIRMATIVE ACT. THE CASE LAW IS CLEAR ON THAT. AND THERE HAS BEEN NO EVIDENCE OF ANY AFFIRMATIVE ACT HERE PRESENTED BY THE STATE.

THE STATE PRESENTED EVIDENCE THAT THEY WEREN'T ABLE TO FIND ANY HISTORICAL RECORD OF SALVAGE EFFORTS BY THE ORIGINAL OWNERS OF THE VESSEL, OR THE CARGOES. IT DOESN'T MEAN EFFORTS DIDN'T OCCUR AND NO EVIDENCE OF ANY ABANDONMENT BY THE ORIGINAL OWNERS OF THE VESSEL OR ITS CARGO.

I THINK MORE IMPORTANTLY THE CASE LAW SAYS THAT THERE CAN BE NO ABANDONMENT BY FAILURE TO SEARCH FOR A VESSEL [p. 58] WHERE THE SEARCH EFFORTS WERE TECHNOLOGICALLY INFEASIBLE.

WE HAVE SUBMITTED UNDISPUTED EVIDENCE TODAY IN OUR PREVIOUS DECLARATIONS THAT SALVAGE EFFORTS WOULD BE TECHNOLOGICALLY INFEASIBLE UNTIL THE LAST YEAR OR TWO, AND THAT HAS NOT BEEN REBUTTED AT ALL BY THE STATE. SO THERE HAS BEEN NO ABANDONMENT.

THE SECOND ISSUE IS IS THE VESSEL EITHER EMBEDDED UNDER ABANDON SHIPWRECK ACT, EITHER EMBEDDED OR DETERMINED BY THE

SECRETARY OF STATE – SECRETARY OF INTERIOR, I AM SORRY, TO BE ELIGIBLE FOR INCLUSION IN THE NATIONAL REGISTER AFTER PUBLIC HEARING AND NOTICE.

THERE HAS BEEN NO EVIDENCE ON EMBEDDEDNESS, AND THE EMBEDDEDNESS ISSUE IS CAREFULLY DEFINED BY THE ACT. AND THE CASE LAW, THE *ZYCH* CASES AND OTHER CASES THAT INTERPRETED THE ABANDONED SHIPWRECK ACT NOTE THAT IT'S VERY CAREFULLY AND NARROWLY DRAFTED TO SERVE CONGRESS' PURPOSE OF CONVEYING TITLE ONLY TO A CERTAIN LIMITED NARROWLY DEFINED CLASS OF SHIPWRECKS TO THE STATES. AND THE ACT SPECIFICALLY SAYS THAT IF A SHIPWRECK DOESN'T FALL WITHIN THAT CLASS, IT CONTINUES TO BE DRIVEN BY TRADITIONAL PRINCIPLES OF ADMIRALTY.

AND SO THE CONCEPT OF EMBEDDEDNESS IS VERY CAREFULLY AND NARROWLY DEFINED AS REQUIRING THE USE OF TOOLS OF EXCAVATION TO REMOVE THE BOTTOM SEDIMENTS. THERE HAS BEEN NO EVIDENCE BY THE STATE THAT TOOLS OF EXCAVATION WOULD BE REQUIRED TO REMOVE THE BOTTOM SEDIMENTS TO GAIN ACCESS TO THE [p. 59] WRECK.

THE STATE'S WITNESS TESTIFIED THAT THERE IS SOME LOOSE SEDIMENT ON THE WRECK, AND THAT IT WAS MOVED AWAY MERELY BY THE PROPULSION ACTION OF THE VEHICLE, AND PRESUMABLY HE SAID THAT IT COULD BE MOVED AWAY JUST BY WIPING WITH THE HUMAN HAND.

THERE IS NO EVIDENCE THAT IT WOULD REQUIRE ANY KIND OF POWER TOOLS TO EXCAVATE THIS WRECK. IN FACT, ALL OF THE INDIVIDUALS THAT ACTUALLY HAVE SEEN THE WRECK FIRSTHAND SUBMITTED DECLARATIONS TO THIS COURT SAYING IN THEIR MARINE . . . ARCHAEOLOGIST AND GEOLOGIST AND SALVAGE EXPERT [sic] ALL SAY THAT THE USE OF TOOLS OF EXCAVATION WOULD NOT BE REQUIRED TO MOVE THE BOTTOM SEDIMENTS. THEY'RE LOOSE, THEY COULD SIMPLY BE WIPED AWAY BY HAND. SO, THERE'S NO EMBEDDEDNESS.

SO, THE STATE HAS TO PROVE UNDEK THE ABANDONED SHIPWRECK ACT THAT THE VESSEL HAS BEEN NOMINATED BY THE SECRETARY OF INTERIOR FOR INCLUSION IN THE NATIONAL REGISTER AFTER A PUBLIC HEARING.

WELL, WE HAVE HEARD THAT THAT HASN'T HAPPENED. IN FACT, THE STATE HAS KNOWN ABOUT THE WRECK FOR A HUNDRED AND THIRTY YEARS, THEY HAVE KNOWN IT'S GENERAL ALTHOUGH NOT PERHAPS NOT PRECISE LOCATION FOR ALMOST THAT LENGTH OF TIME.

AND I RESPECTFULLY SUBMIT THAT IT IS SOMEWHAT DISINGENUOUS FOR THE STATE TO COME IN HERE TODAY AND ASSERT THAT THEY HAVE A VITAL INTEREST IN THIS – IN THIS VESSEL WHEN [p. 60] THEY HAVEN'T DONE ANYTHING TO NOMINATE IT FOR THE NATIONAL REGISTER, HAVEN'T DONE ANYTHING TO DETERMINE ITS PRECISE LOCATION.

IF DEEP SEA RESOURCES WITH ITS LIMITED RESOURCES WAS ABLE TO LOCATE THE VESSEL, THE STATE OF CALIFORNIA WITH ALL ITS POWER CERTAINLY COULD HAVE IF IT HAD A VITAL INTEREST IN DOING SO.

BUT IN ANY EVENT, IT HAS NOT BEEN NOMINATED BY THE SECRETARY OF INTERIOR FOR INCLUSION IN THE NATIONAL REGISTER SO THE ABANDONED SHIPWRECK ACT SIMPLY DOES NOT APPLY.

I THINK THE STATE, IN ESSENCE, HAS CONCEDED THAT BECAUSE NOW IT SEEMS TO BE RELYING MORE ON 6313 OF THE CALIFORNIA PUBLIC RESOURCES CODE. BUT 6313 ALSO REQUIRES ABANDONMENT.

IN THE FIRST SENTENCE IT SAYS: TITLE TO ALL ABANDONED SHIPWRECKS. AND AGAIN, THE ABSENCE OF ANY PROOF OF ABANDONMENT WOULD DEFEAT THE STATE'S CLAIM OF TITLE UNDER 6313.

COUNSEL MADE A STATEMENT THAT THE ACT PRESUMES ABANDONMENT AFTER FIFTY YEARS, BUT I WOULD RESPECTFULLY DISAGREE. I WOULD DIRECT THE COURT'S ATTENTION TO SUBSECTION C OF 6313, WHICH SAYS, AND I QUOTE:

> "ANY SUBMERGED ARCHAEOLOGICAL SITE OR SUBMERGED HISTORICAL RESOURCES REMAINING IN STATE WATERS FOR MORE THAN FIFTY YEARS SHALL BE PRESUMED TO BE [p. 61] HISTORICALLY SIGNIFICANT, PRESUMED TO BE HISTORICALL [sic] SIGNIFICANT."

NOT PRESUMED TO BE ABANDONED. AND THERE HAS BEEN NO PROOF OF ABANDONMENT HERE.

WE DON'T DISAGREE THAT THE VESSEL IS IN SOME THEORETICAL SENSE HISTORICALLY SIGNIFICANT, BUT THAT'S NOT ENOUGH. IT HAS TO BE ABANDONED AND IT HAS TO BE EMBEDDED. AND ALTHOUGH IT MAY BE IN SOME THEORETICAL SENSE HISTORICALLY SIGNIFICANT, THE STATE HAS DONE NOTHING PRACTICAL TO FURTHER THAT INTEREST HERE.

AND FINALLY, IF THE COURT IS CONVINCED THAT 6313 MIGHT APPLY HERE, MIGHT GIVE THE STATE A COLORABLE CLAIM, I WOULD URGE THE COURT TO FIND THAT 6313 IS PREEMPTED BY THE ASA. I THINK THE ASA IS THE ONLY STATUTE UNDER WHICH THE STATE CAN CLAIM TITLE TO THIS VESSEL.

BECAUSE THE ASA WAS PASSED BY CONGRESS ENACTED BY CONGRESS WITH THE INTENT OF FINALLY AND ONCE AND FOR ALL DETERMINING AND SETTLING THE UNCERTAINTIES THAT EXISTED WITH REGARD TO DETERMINING TITLE TO ABANDONED SHIPWRECKS. AND CONGRESS ESSENTIALLY SAT DOWN AND SAID, LET'S RESOLVE THIS QUESTION ONCE AND FOR ALL IN A UNIFORM WAY.

LET'S PICK A CERTAIN SPECIFIC NARROWLY DEFINED CLASS OF SHIPWRECKS, LET'S CONVEY TITLE TO THOSE, TO THE STATES, AND AS TO OTHERS THAT FALL IN THAT CLASS, THEY WILL CONTINUE TO BE GOVERNED BY GENERAL ADMIRALTY PRINCIPLES.

[p. 62] I'M ALMOST DONE, YOUR HONOR.

THE COURT: OH, NO, YOU TAKE YOUR TIME. YOU TAKE ALL THE TIME YOU THINK YOU NEED. YOU CAN HOLD THAT ASIDE.

MR. ALFORD: SO AGAIN, CONGRESS TRIED TO RESOLVE THIS MATTER ONCE AND FOR ALL IN AN [sic] UNIFORM WAY, AND THE STATE COMES ALONG AND SAYS, WELL, NO, WE'RE GOING TO SERVE TITLE TO A BROADER CLASS OF SHIPWRECKS, THAN CONVEYED BY THE ASA. WE'RE GOING TO SERVE TITLE TO SHIPWRECKS EVEN THAT AREN'T EMBEDDED AND EVEN THAT AREN'T NOMINATED BY THE SECRETARY OF INTERIOR FOR INCLUSION IN THE NATIONAL REGISTER.

AND I THINK THAT'S THE ASPECTS – THAT'S THE ASPECT OF 6313. IT'S PREEMPTED. I THINK THE STATE – THE ASA CLEARLY CONTEMPLATES THAT THE STATE WILL HAVE SOME REGULATORY INTEREST IN DETERMINING THE DISPOSITION OF VESSELS TO WHICH THE STATE GAINED TITLE UNDER THE ASA, BUT IT'S AN ENTIRELY DIFFERENT MATTER TO SAY THAT THE STATE MAY ASSERT TITLE TO A BROADER CLASS OF SHIPWRECKS THEN DEFINED AND GIVEN TO IT BY THE ASA.

SO, TO THE EXTENT THAT 6313 PURPORTS TO GRANT THE STATE TITLE TO THE VESSEL, TO A BROADER CLASS OF VESSELS GRANTED TO THE STATE BY THE ASA, IT'S PREEMPTED BY THE ASA.

JUST ONE FURTHER POINT. THERE HAS BEEN A LOT OF TESTIMONY TODAY ABOUT THE HISTORICAL SIGNIFICANCE OF THE VESSEL.

THE COURT: TRACY OR DAVID, WOULD YOU TELL THE [p. 63] COUNSEL IN THE OTHER CASE TO ASSEMBLE, WE HAVE A VERDICT?

THE CLERK: YES, I WILL, JUDGE.

MR. ALFORD: AGAIN, WE DON'T DISAGREE NECESSARILY THAT THE VEHICLE – THAT THE VESSEL HAS SOME HISTORICAL SIGNIFICANCE.

IN THAT REGARD, WE WOULD CERTAINLY BE WILLING TO AGREE WITH THE STATE THAT IN THE COURSE OF THE SALVAGE OPERATIONS, WE WOULD RETRIEVE AND CONVEY TO THE STATE ANY HISTORICAL ARTIFACTS THAT ARE ACCESSIBLE DURING THE SALVAGE OPERATION. WE WOULD CONVEY THOSE TO THE STATE. WE DON'T HAVE ANY OBJECTION TO THAT.

AND JUST THE FINAL LAST POINT ABOUT WHAT WILL HAPPEN IF THE COURT GRANTS THE MOTION TODAY. I THINK CLEARLY WHAT WOULD HAPPEN IS DSR WOULD BE LEFT WITHOUT ANY REMEDY AT ALL.

THERE IS A LONG LINE OF CASES, U.S. SUPREME COURT CASES, DISTRICT COURT, CIRCUIT COURT CASES ALL SAYING THAT AN ACTION TO – A SALVAGE ACTION TO CONFIRM TITLE IS AN IN REM ADMIRALTY ACTION, AND IT IS UNIQUELY AND EXCLUSIVELY WITHIN THE FEDERAL COURT'S JURISDICTION.

JUST LIKE TO QUOTE REALLY BRIEFLY FROM HOUSEMAN VERSUS THE CARGO OF THE SCHOONER WHERE JUSTICE TANEY SAID, QUOTE:

> "NOW, THE MATTER IN DISPUTE IS MERELY A QUESTION OF SALVAGE. UPON SUCH QUESTIONS THERE CAN BE NO DOUBT OF THE JURISDICTION OF THE COURT OF ADMIRALTY NOR OF [p. 64] ITS AUTHORITY TO PROCEED IN REM AND ATTACH THE PROPERTY DETAINED. THE ADMIRALTY IS THE ONLY COURT, THE ONLY COURT WHERE SUCH A QUESTION CAN BE TRIED FOR WHAT OTHER COURT, BUT THE COURT OF ADMIRALTY HAS JURISDICTION TO TRY SUCH A QUESTION."

SO I THINK THAT IF WE ARE OUSTED FROM FEDERAL COURT, WE WOULD BE LEFT WITHOUT A REMEDY IN STATE COURT BECAUSE THE FEDERAL COURT IS THE COURT WITH EXCLUSIVE JURISDICTION FOR – TO CONFIRM TITLE TO SHIPWRECKS IN AN IN REM SALVAGE ACTION.

THE COURT: AND YOUR VIEW THEN IS THE STATE COURT WOULD NOT – FIRST, IS IT YOUR VIEW YOU COULD NOT GO IN STATE COURT AS A PLAINTIFF AND SUE THE STATE UNDER SOME SORT OF DECLARATORY JUDGMENT AVENUE TO DETERMINE TITLE BETWEEN YOUR CLIENT AND THE STATE?

THAT OBVIOUSLY ISN'T THE BROAD COVERAGE YOU GET IN AN ADMIRALTY IN REM ACTION TO HAVE YOUR JUDGMENT BIND THE PARTIES IN COURT AND THE REST OF THE WORLD?

MR. ALFORD: RIGHT.

THE COURT: YOUR VIEW IS THAT THAT'S NOT AN AVAILABLE PROCEDURE IN STATE COURT?

MR. ALFORD: YOUR HONOR, I DON'T KNOW.

PERHAPS WE COULD BRING AN ACTION AGAINST THE STATE OF CALIFORNIA IN STATE COURT TO CONFIRM TITLE AS BETWEEN DSR AND THE STATE, HOWEVER, AGAINST DSR AND THE WORLD, AS YOU [p. 65] CORRECTLY NOTED, THAT WOULD BE EXCLUSIVE WITHIN THE COURT'S, FEDERAL COURT'S ADMIRALTY JURISDICTION.

THE COURT: I HAVE ASKED MR. RUSCONI TO JUST GIVE ME A BRIEF MEMO ON THAT NARROW POINT TO WHAT EXTENT CAN THE PLAINTIFF MAKE CLAIM EVEN AGAINST THE WISHES OF THE STATE BY NAMING THE STATE IN A SUIT IN STATE COURT, HAS THE STATE WAIVED ITS IMMUNITY, IF IT HAS ANY TO THAT SORT OF A CLAIM, AND SECONDLY, WAS THE COVERAGE IN SUCH A PROCEEDING, IF ONE COULD EXIST, EQUIVALENT TO THE ADMIRALTY COVERAGE YOU GET IN THE FEDERAL COURT.

ALL RIGHT. I'M NOT LOOKING FOR A LENGTHY BRIEF, JUST THAT NARROW TOPIC. IT MAY NOT HAVE ANY REAL ULTIMATE BEARING, BUT THAT WOULD MORE OR LESS COMPLETE THE CIRCLE, IF YOU WILL.

MR. ALFORD: ALL RIGHT. THANK YOU, YOUR HONOR.

THE COURT: MR. RUSCONI, ANYTHING FURTHER?

MR. RUSCONI: THE ONLY COMMENT I WOULD HAVE, YOUR HONOR, I DID MISS SPEAK [sic] ABOUT THE FIFTY YEARS. IT IS TOWARD THE HISTORIC SIGNIFICANCE.

THE COURT: THAT WILL HAPPEN.

MR. RUSCONI: BUT THE – MR. ALFORD'S VIEW OF THE ELEVENTH AMENDMENT IS IN ORDER TO RECEIVE THE BENEFITS OF IT, YOU HAVE TO PROVE THAT YOU DON'T NEED IT. YOU HAVE TO PROVE THAT YOU OWN THE VESSEL, AND ONCE YOU OWN THE VESSEL, THEN YOU CAN HAVE THE ELEVENTH AMENDMENT IMMUNITY.

[p. 66] WELL, OBVIOUSLY, IF THAT'S TRUE, YOU DON'T NEED THE ELEVENTH AMENDMENT IMMUNITY. I THINK THE CASES GO FAR BEYOND WHAT HIS INTERPRETATION WOULD LEAD.

THE COURT: THANK YOU, VERY MUCH, COUNSEL. I APPRECIATE YOUR SUBMISSION. THEN WE'LL TAKE IT UNDER ADVISEMENT AND WILL RENDER A PROMPT DECISION. I'M NOT SURE WHEN, BUT I WANT TO EXAMINE THE VIDEO, AND I WANT TO SEE THE SUPPLEMENTAL BRIEFS.

MR. RUSCONI: WHEN DO YOU WANT THOSE FILED, YOUR HONOR?

THE COURT: YOU TELL ME, WITHIN TEN DAYS?

MR. RUSCONI: THAT'S FINE.

MR. ALFORD: CERTAINLY, YOUR HONOR.

THE COURT: TEN DAYS JUST BOTH FILE SIMULTANEOUS BRIEFS.

IF THERE IS ANYTHING YOU THINK YOU SHOULD RESPOND TO WITHIN FOUR OR FIVE DAYS, FIVE DAYS AFTER GETTING THAT BRIEF, FILE A REPLY. OTHERWISE, WHATEVER BRIEF YOU SUBMIT WILL BE YOUR POSITION.

MR. ALFORD: THE UNDERSTANDING WILL BE THE BRIEFING WILL BE LIMITED TO THAT ONE ISSUE.

THE COURT: ONE ISSUE, THE ONE POINT THAT IS THE NEXT STEP.

FOR EXAMPLE, IF THE STATE OF CALIFORNIA IS CORRECT HERE, IT JUST SEEMS TO ME THAT THAT CAN ONLY BE WHAT WAS [p. 67] INTENDED, IF WE KNOW WHAT THE NEXT STEP IS. IF THE NEXT STEP IS GOING TO RESOLVE THE OTHER, EITHER CLAIMANT'S OR INTERVENOR'S POSITION AS WELL AS THE STATE, THEN THAT TELLS US SOMETHING. BUT FOR SOME REASON THERE IS A GAP THERE, THEN THAT HAS TO DO WITH WHAT IS THE INTENT, MAYBE, OF HAVING THE MATTER DISMISSED AND HEARD IN ANOTHER COURT.

MR. ALFORD: THANK YOU, YOUR HONOR.

MR. RUSCONI: THANK YOU.

THE COURT: THANK YOU.

(PROCEEDINGS ADJOURNED)

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA 94102, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 2 THROUGH 67, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

/s/ Diane E. Skillman
DIANE E. SKILLMAN, CSR
OFFICIAL REPORTER, USDC

ORDER GRANTING PRELIMINARY INJUNCTION AND APPOINTING DEEP SEA RESEARCH EXCLUSIVE SALVOR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEEP SEA RESEARCH, INC. Plaintiff, v. THE BROTHER JONATHAN, her appurtenances, furniture, cargo, etc., Defendant, and THE STATE OF CALIFORNIA, STATE LANDS COMMISSION, and the UNITED STATES OF AMERICA, Intervening Defendants.	:	C 91-3899 LCB ORDER (Filed Apr. 18, 1995)

AND NOW, TO WIT, this 5th day of April, 1995, upon consideration of plaintiff Deep Sea Research, Inc.'s ("DSR") motion for a preliminary injunction appointing DSR exclusive salvor of the wreck of the *Brother Jonathan*, her appurtenances, furniture and cargo (collectively "*Brother Jonathan*"), protecting DSR's continued right to exclusive possession of the *Brother Jonathan*, and protecting DSR from interference from rival salvors, and pursuant to the court's Memorandum dated March 15, 1995, IT IS ORDERED that said motion is *granted*.

IT IS FURTHER ORDERED as follows:

1. In accordance with the court's March 15, 1995 Memorandum, DSR is hereby given priority salvage status, and sole exclusive possession of the *Brother Jonathan*;

2. All competing salvors, would-be salvors, or divers, are hereby enjoined from interfering with DSR's efforts to recover artifacts from the *Brother Jonathan*;

3. All competing salvors, would-be salvors, or divers, are hereby enjoined from conducting salvage operations or collecting artifacts within an area described as a circle having a radius of 5,200 feet (*i.e.*, a diameter of 10,400 feet), having its center point at the geographic coordinates 41 degrees, 46.29 minutes North, and 124 degrees, 20.50 minutes West;

4. This preliminary injunction shall remain in effect for a period of eighteen (18) months from the date of this Order;

5. At least 90 days, but no more than 120 days, before the expiration of the eighteen (18) month time period, DSR may apply to the court to extend the preliminary injunction from year to year until salvage operations are completed. DSR's application shall include a detailed description of its salvage efforts to date, including a description of the number of days or man-hours expended during salvage operations, the extent to which DSR has preserved the archaeological value of the wreck, and an outline of DSR's future plans for salvaging the *Brother Jonathan*.

/s/ Louis C. Bechtle, J.
LOUIS C. BECHTLE, J.